

(24,444)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 287.

CORNELIUS B. PARKER AND JANIE B. PARKER, HIS
WIFE, APPELLANTS,

vs.

ANTONIO MONROIG ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF PORTO RICO.

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1 In the District Court of the United States for Porto Rico.

In Chancery. No. —.

ANTONIO MONROIG et al.

vs.

CORNELIUS B. PARKER et al.

Specific Performance and Injunction, Etc.

Reformed Complaint.

(Filed November 6, 1913.)

To the Honorable Peter J. Hamilton, Judge of the District Court of the United States for Porto Rico:

Antonio Monroig and Josefa O. Monroig, citizens of Porto-Rico, and Agustina S. Monroig, and her husband Albert S. Menéndez, citizens of the United States of America, of lawful age, and José A. López Monroig, a citizen of Porto-Rico, infant under the age of twenty-one years, by his father and natural guardian José A. Lopez Antongiorgi, and all residents of San Juan, Porto-Rico, bring this, their bill, against Cornelius B. Parker and his wife Jennie B. Parker, who are citizens of the United States of America, residing in the City of New York, but temporarily sojourning in Porto-Rico.

And thereupon your orators respectfully complain and show unto your honor:

First.

That the plaintiffs are joint owners of the following described tract of land, to wit:

"A tract of land situated in the barrio of Pájaros, Municipality of Bayamón, containing two hundred and seven cuerdas and seventeen hundredths of another, bounded on the North by the creek known by the name of "Quebrada Santa Catalina" and property belonging to C. B. Parker; on the East, by lands of C. B. Parker, on the South, by the same lands belonging to C. B. Parker and the Scott Road and on the West, by said Scott Road, and the Santa Catalina Fruit Company, formerly Lucas A. Scott."

2 Second.

And your orators further allege that the above described property was purchased on the 19th day of August A. D. 1911, by the complainant Antonio Monroig, for the joint benefit of all of the complainants herein from the defendants Cornelius B. Parker and his wife Jennie B. Parker, and said portion of land being segregated by said defendants from a large tract known as "El Quinto," which was described prior to said segregation as follows, to wit:

"Rustic estate, known as "El Quinto," situated in the barrio of Pájaros, Municipality of Bayamón, containing 287 cuerdas 16 hundredths of land, bounded on the North by lands of Atanasio Maysonet, at present, San Miguel Hermanos and the Quebrada Santa Catalina; on the South, by the Comerío Road; on the East, by lands of Pompeyo Oliu, and on the West, by lands of León and Jesus Ramos and the Sucesión of Ricardo Hance."

Third.

And your orators further allege that as a consequence of the segregation and sale by the defendants to the plaintiff Antonio Monroig, as aforesaid and which sale these complainants allege was for the benefit of all of the complainants herein, there remained in the possession of the said defendants as a balance, a tract of land bordering on the Comerío Road, which is described as follows:

"Rustic estate containing 79 cuerdas 99 hundredths of land, more or less, situated in the barrio of Pájaros, Municipality of Bayamón, bounded on the North by the portion sold to plaintiff Antonio Monroig, described in the paragraph I of this complaint, and the Quebrada Santa Catalina; on the East, by the Comerío Road; on the South by the said portion sold to the plaintiffs, the Scott Road and the Comerío Road; and on the West, by the Sucesión Monroig (The plaintiffs herein)."

Fourth.

And your orators further allege that before the final execution of the deed of conveyance to the tract of land described under the first paragraph herein referred to, it was expressly understood, agreed and covenanted by and between the plaintiff Antonio Monroig for and on behalf of all of the complainants, and the defendants herein, that the plaintiffs would purchase the said 207 cuerdas 17 hundredths described in the first paragraph of this complaint and which was segregated from the 287 cuerdas tract for the sum of \$25,896.25 in consideration of the fact and under the express understanding and condition that the said defendants, would allow and consent the establishment of an easement or right of way, over the property remaining in possession of said defendants, containing 79 cuerdas of land 99 hundredths described last above, as the servient estate, in order that plaintiff's property should have access to the Comerío Road and also agreed and covenanted to allow a like easement or servitude over another estate belonging to said defendants, situated directly across the Comerío Road and known as the "Río-Hondo" finca, and which easements, or rights of way were respectively to attach to and be for the benefit of the plaintiffs' property containing 207 cuerdas and 17 hundredths herein described in the first paragraph hereof as the dominate estate.

Fifth.

And your orators further allege that the said easement or servitude was to be predial, discontinuous and permanent in character and

established for the express purpose of constructing and maintaining a private railroad over the strip of land comprising said easement, which was to be used by plaintiffs for the transporting of sugar cane to the Central Juanita Incorporated. Your orators state and allege that it was agreed by and between the said parties hereto, that the said strip of land to be used as an easement aforesaid, was to
4 be five meters wide by seventy five feet long more or less, the exact length of which was to be the distance measuring between the complainant's property described herein under the first paragraph, and the Comerio Road, and over the strip reserved by defendants, described in the third paragraph hereof.

Sixth.

And your orators further allege and show unto your honor that the defendants partly complying with the said agreement thereafter did sign and execute a deed unto your orators granting a right of way or easement over the said defendant's property known as "Rio-Hondo," which lies directly across the Comerio Road, but said defendants did refuse and do refuse to execute a deed granting the right of way over the strip of land described in the third paragraph hereof contrary to the agreement made at the time of the purchase hereinbefore referred to. That although plaintiffs herein have made repeated demands both verbally and in writing upon defendants requesting the execution of said deed. Your orators hereby allege and state that the only reason which induced the plaintiffs to purchase the said 207 cuerdas and 17 hundredths of land and to pay the said sum of \$25,896.25 therefor to defendants, was the fact that the defendants offered, promised and agreed in favor of plaintiffs to allow a right-of-way or easement over the properties herein referred to, belonging to defendants and that the plaintiffs would not have purchased the said tract described in the first paragraph hereof at any price had it not been for the offer and promise of the defendants to establish and consent to the easement hereinbefore referred to.

5

Seventh.

And your orators further allege and show unto your honor that they have in every respect complied with all the obligations imposed upon them by the terms of the agreement of purchase and sale herein referred to, and that immediately after the said purchase of the land referred to herein the said plaintiffs did enter upon the strip of land designated to be used as the right-of-way over the tract described under the third paragraph hereof, and did in accordance with the said agreement, use the same for transporting sugar cane during the cane crop of 1911-1912-1913, passing and repassing thereon with bull carts without any objection or interference on the part of the defendants.

Eighth.

And your orators state that the land reserved by defendants, described in the third paragraph hereof lies between the "Rio-Hondo"

property also belonging to said defendants (and over which the defendants did sign a deed granting a right-of-way) and the property purchased by plaintiffs from defendants, and that the plaintiffs can not reach the right-of-way attached to the Rio Hondo property so granted by defendants, because the defendants refuse to permit the plaintiffs to pass and use the right-of-way over the balance of the "Quinto" property remaining in possession of defendants.

Ninth.

And your orators allege that immediately after the close of the cane crop of 1913, that is to say during the month of July of said year, the said defendants did write to plaintiffs prohibiting them to use of the said strip of land and threatened to close up the entrance thereto and thereby prevented the plaintiffs from laying the
6 railroad tracks over the said strip of land, as they were entitled- so to do.

Tenth.

And your orators further allege and show that the plaintiffs through Antonio Monroig covenanted with the defendants and consummated the purchase of the said 207 cuerdas of land described hereinbefore with the strict and clear understanding and agreement with the defendants that the plaintiffs would be allowed a permanent easement for the purpose of constructing and maintaining a private railroad over the said strip of land hereinbefore described under the third paragraph hereof which said railroad was to be used for the transportation of sugar cane to plaintiff's sugar central, known as Central Juanita, situated in the Bayamón District.

Eleventh.

And your orators further allege and show unto your honor that the plaintiffs are now ready to construct the said railroad on and over the place designated and agreed upon by the parties herein as the strip of land to be used as a servitude or easement and have so notified the defendants, but the said defendants refuse to allow your orators to pass over the said strip of land as aforesaid and have threatened to close the entrance thereto and obstruct the same to the prejudice and damage of your complainants herein. Your orators hereby set forth and allege that the said strip of land in controversy, has a value of One Thousand (\$1,100.00) and One Hundred Dollars.

Twelfth.

And your orators further show that the sugar-cane grinding season at the Central Juanita, will begin on or about the first day of December next, and that it is absolutely necessary that plaintiff's
7 railroad should cross defendant's property and reach the Comerío Road in order to load the cane belonging to colonos; this being the only convenient and adequate place to make said loading as the plaintiff's scales and apparatus for hoisting the cane into

the railroad cars are located at this place, and this Section of the road can only be completed in time to have the sugar cane during the next crop by an immediate starting of its construction.

Your orators, therefor-, pray that a final Decree be entered herein Decreeing that the defendants herein shall consent to the establishment over their said estate described hereinbefore under the third paragraph hereof and for the benefit of the servient estate hereinbefore described under the first paragraph hereof and of the present and future owners thereof an easement or right-of-way, to be predial, discontinuous and perpetual in character, measuring five meters wide and about seventy-five feet long and particularly at a place known on defendants' said property between lots number 285 and 291 as designated on a certain urbanization plan of the "Quinto" property belonging to defendants herein, and which strip of land as aforesaid is to be used by plaintiffs for the construction and operation of a railroad to connect said plaintiffs' private railroad with the Comercio Road, and that the defendants be ordered and decreed to sign and execute unto plaintiffs herein, a good and sufficient deed specifically performing the acts herein complained of.

And your orators hereby pray that a writ of injunction issue directed to the said Cornelius B. Parker and his wife Jennie B. Parker, enjoining them and any person by or under their instruction from obstructing the said entrance to said strip of land constituting the right-of-way and to absolutely resist and refrain from interfering with the laying of the said railroad tracks over the strip of land herein described and referred to, and from in any manner interfering with the free use and enjoyment thereof by plaintiffs, and that said injunction shall be granted immediately and preliminary to the hearing herein and to be in force and until such times as your honor shall appoint, direct and order herein; and that upon a hearing of this writ, herein prayed for that the same be made and confirmed until the final determination of this suit, and that thereupon the said injunction may be made perpetual.

And your orators pray that your honor grant such other and further relief herein as in equity and good conscience may seem just and proper.

Signed)

FRANK ANTONSANTI,
Solicitor for Complainants.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Antonio Monroig, being duly sworn deposes and says that he is one of the complainants in the above entitled suit; that he has read the foregoing Bill of Complaint and know the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed)

ANTONIO MONROIG.

Sworn to and subscribed before me, by Antonio Monroig, personally known to me and who is of age, a property owner, married and a resident of San Juan, this 6th, day of November, 1913.

[SEAL.]

(Signed)

RAFAEL GUILLERMETY, *Clerk*,
By A. AGUAYO, *D'p'ty*.

9 In the District Court of the United States for Porto Rico.

(Filed November 11th, 1913.)

In Chancery. No. —.

ANTONIO MONROIG et al.

vs.

CORNELIUS B. PARKER et al.

Specific Performance and Injunction, Etc.

Answer of Defendants to the Reformed Bill.

Now come the defendants herein Cornelius B. Parker and Janie B. Parker by their attorneys O. M. Wood and Joseph Anderson, Jr., said defendants being absent, in the United States, and answering the bill in Equity presented against them respectfully show to your Honor and say:

That they admit the allegations contained in paragraph first of the Bill, to the fact that the plaintiffs are joint owners of the land described therein.

II.

That they admit the allegations contained in paragraph second of the Bill.

III.

That they admit the allegations contained in paragraph third of the Bill.

IV.

10 That they deny the allegations contained in paragraph fourth of the Bill and allege the facts to be that prior to the final Execution of the deed of conveyance of the tract of land described in the first paragraph of the Bill, that Valentin Monroig brother of said Antonio Monroig as representative of the "Sucesores of A. Monroig," and for himself, entered into an agreement to purchase all that tract or parcel of land situated in the Municipality of Bayamón and composed of about two hundred acres, a part of the farm known as "El Quinto" of Bayamón, then owned by Mr. W. G. Henry, and to be purchased by Cornelius B. Parker in accordance with an agreement of sale, which the said Parker had from its then owner.

The said Valentin Monroig personally and in his representative capacity agreeing to pay one hundred twenty-five dollars (\$125),

per cuerda. Which said land was to be bounded on the South by a line parallel to the Comercio road, and seventy-five feet therefrom leaving a well defined rectangular strip (75 feet wide and extending the full length of the property to be bought) to the said Cornelius B. Parker and wife.

Which said piece of land to be bought by said Valentin Monroig would have measured 211 and a fraction cuerdas, instead of the 207.17 cuerdas which they the plaintiffs actually bought. So that when the deed came to be executed, plaintiffs refused to purchase the remaining strip of land of nearly 4 cuerdas thus leaving in the possession of defendants, a triangular strip of land, extending the full length of plaintiff's property and measuring about 105 feet at one end and running to a point at the other, a parcel which on account of its position, shape and dimensions, and defendants' plan of urbanization, is of little or no use or value. The plaintiffs thus violating their understanding and agreement, before the sale and execution of the deed, to the great detriment of defendants. But

11 the defendants specifically deny that the consideration of such agreement was the express understanding and condition that the defendants would allow and consent to the establishment of an easement of right of way over the property remaining in possession of defendants, as alleged in the bill, but state the fact to be that the only consideration expressed in said agreement of purchase and sale was ten dollars, true and lawful money of the United States receipt of which was acknowledged.

V.

And further answering, the defendants state that they deny that the agreement referred to in paragraph fourth of the Bill, contained anything whatsoever of any easement or servitude, predial, discontinuous or permanent as alleged in paragraph five of the bill and for the purpose of constructing or maintaining a private railroad or for any other purpose; or that the same was to be five meters wide, by seventy-five feet long, more or less, and state the fact to be that the only agreement as to any easement was a mere understanding by the parties based upon the absolute carrying-out in all its particulars, of the contract of purchase and sale, referred to above, which said contract of purchase and sale was merged into and absolutely rescinded by the execution of the deed of conveyance. Both parties waiving all rights under any prior agreement, not included in the terms of the conveyance.

VI.

Further answering, the defendants state that they admit the granting of a right of way or easement over defendants' property known as "Rio Hondo", but deny that the same was in partial performance of any agreement, and state the fact to be, that the

12 said conveyance was made to the satisfaction of all parties and so accepted at the time and in complete compliance with all understanding, verbal or otherwise, theretofore had between the

parties. And defendants further state that it was only subsequent thereto, that the plaintiffs discovered the desirability of having a right of way over Defendants' "El Quinto" property, which they had waived by purchasing 207.17 cuerdas instead of 211 cuerdas.

VII.

The defendants deny the allegations of paragraph seven of the Bill and state the facts to be as heretofore set forth in paragraphs four and five of this answer and they further deny that the plaintiffs have used without any objection on the part of the defendants, the alleged, heretofore mentioned right of way for the 1911-1912-1913 crops—and state the fact to be that they have never allowed the plaintiffs free passage over said right of way and when allowed to any one, has only been allowed under a distinct understanding of defendants' property rights.

VIII.

Defendants deny the allegations of paragraph eighth and allege the fact to be that plaintiffs have a free and easy access to the highway known as the Comerio Road through the public road known as the Scott Road, which they need to traverse but 180 feet and that there is no geographical connection now between the right of way over Rio Hondo and the desired right of way over "El Quinto".

IX.

13 Defendants admit the allegations of paragraph ninth to the effect that they have prohibited the use of said right of way and state that said prohibition was entirely within their rights as they are owners in fee simple of said land, which was not subject to any easement whatsoever.

X.

Defendants deny the allegations of paragraph tenth and state the truth to be as hereinbefore set forth in paragraphs four and five of this answer.

XI.

Defendants admit allegations of paragraph eleventh as to the fact that plaintiffs are ready to build their railroad and state that if the refusal of defendants to allow them so to do is to their prejudice and damage, their remedy, if any they have, is in a court of law. And defendants further state that the value of the strip of land in controversy is not one thousand one hundred dollars (\$1,100) as alleged but over six thousand dollars (\$6,000).

XII.

The defendants further deny the allegations of paragraph twelfth as to the grinding season at the Central Juanita and state that the grinding season at that mill does not begin till well into January and defendants further state as heretofore stated that plaintiffs have

free exit through their own land to the Scott Road, which at an expenditure of much less than the loss would be to the defendants, would be rendered perfectly adequate to the plaintiffs for the purposes set forth.

14

XIII.

And for a further and affirmative defense these defendants state that the plaintiffs have often recognized the ownership and dominion of these defendants to the property in controversy and have offered to buy the same, which the defendants would agree to, could an agreement be arrived at as to the price thereof.

XIV.

And for a further and affirmative defense, defendants state from the allegations of the bill, it appears that the Central Juanita is the real party interested in this case and it does not appear that there is any comity of interest between these plaintiffs and the Central Juanita or that these plaintiffs are colonos, lessors or lessors of the Central Juanita.

XV.

And for a further and final affirmative defense these defendants state that the Bill exhibited herein does not show any equity, that their remedy, if any they, plaintiffs, have, is at law where adequate damages, if they are entitled to any, which defendants deny, can be secured for the breach of any contract, (the existence of which is denied) made prior to the execution of the conveyance and not merged therein. And furthermore if there be any remedy at all in Equity for these plaintiffs it should be in the form of a decree for the Specific Performance of a Contract, after the same has been proven and not in the form of an injunction either temporary or permanent which ousts defendants from the possession of their property and gives it to the plaintiffs.

15 Wherefore the defendants pray your honor that the Bill against them be dismissed with costs.

San Juan, P'to Rico, November 11, 1913.

(Signed)

O. M. WOOD,

JOSEPH ANDERSON, JR.,

Solicitors for Defendants.

(Signed)

CORNELIUS B. PARKER,

By O. M. WOOD, *Solicitor.*

Verification.

DISTRICT OF PORTO RICO,

City of San Juan, ss:

O. M. Wood being sworn says that he is one of the solicitors for the defendants, that he has personal knowledge of the facts alleged in

the foregoing petition which he has read and that the same are true.

That he makes this verification because the defendants are both absent from the Island and District of Porto Rico.

(Signed)

O. M. WOOD.

Subscribed and sworn to this 11th day of Nov. 1913.

(Signed)

RAFAEL GUILLERMETY, *Clerk*,
By L. A. GROSS, *Deputy*.

[SEAL.]

16 In the District Court of the United States for Porto Rico.

(Filed January 13th, 1914.)

In Chancery, No. —.

ANTONIO MONROIG et al.

VS.

CORNELIUS B. PARKER et al.

Specific Performance and Injunction, etc.

Amended Answer of Defendants to the Reformed Bill.

Now come the defendants herein Cornelius B. Parker and Janie B. Parker by their attorneys O. M. Wood and Joseph Anderson Jr., and answering the bill in Equity presented against them respectfully show to your Honor and say:

[NOTARY SEAL.]

That they admit the allegations contained in paragraph first of the Bill, to the fact that the palintiffs are joint owners of the land described therein.

II.

That they admit the allegations contained in paragraph second of the Bill.

III.

That they admit the allegations contained in paragraph third of the Bill.

17

IV.

That they deny the allegations contained in paragraph fourth of the Bill and allege the facts to be that prior to the final Execution of the deed of conveyance of the tract of land described in the first paragraph of the Bill, that Valentin Monroig brother of said Antonio Monroig as resrepresentative of the "Sucesores of A. Monroig," and for himself, entered into an agreement to purchase all that tract or parcel of land situated in the Municipality of Bayamón and composed

of about two hundred acres, a part of the farm known as "El Quinto" of Bayamón, then owned by Mr. W. G. Henry, and to be purchased by Cornelius B. Parker in accordance with an agreement of sale, which the said Parker had from its then owner.

The said Valentin Monroig personally and in his representative capacity agreeing to pay one hundred twenty-five dollars (\$125), per cuerda. Which said land was to be bounded on the South by a line parallel to the Comerío road, and seventy-five feet therefrom leaving a well defined rectangular strip (75 feet wide and extending the full length of the property to be bought) to the said Cornelius B. Parker and wife.

[NOTARY SEAL.]

Which said piece of land to be bought by said Valentin Monroig would have measured 211 and a fraction cuerdas, instead of the 207.17 cuerdas which they the plaintiffs actually bought. So that when the deed came to be executed, plaintiffs refused to purchase the remaining strip of land of nearly 4 cuerdas thus leaving in the possession of defendants, a triangular strip of land, extending the full length of plaintiff's property and measuring about 105 feet at one end and running to a point at the other, a parcel which on account of its position, shape and dimensions, was of little or no use or value to defendants at that time but now on account of the defendant's plan of urbanization and development of property is now valued at from fifty cents to eighty cents per meter. The plaintiffs thus violating their understanding and agreement, before the sale and execution of the deed, to the then great detriment of defendants. But the defendants specifically deny that the consideration of such agreement was the express understanding and condition that the defendants would allow and consent to the establishment of an easement of right of way over the property remaining in possession of defendants, as alleged in the Bill, but state the fact to be that the only consideration expressed in said agreement of purchase and sale was ten dollars, true and lawful money of the United States receipt of which was acknowledged.

V.

[NOTARY SEAL.]

And further answering, the defendants state that they deny that the agreement referred to in paragraph fourth of the Bill, contained anything whatsoever of any easement or servitude, predial, discontinuous or permanent as alleged in paragraph five of the Bill and for the purpose of constructing or maintaining a private railroad or for any other purpose; or that the same was to be five meters wide, by seventy-five feet long, more or less, and state the fact to be that the only agreement as to any easement was an understanding between the parties based upon the absolute carrying-out in all its particulars of the contract of purchase and sale referred to above, the memorandum of which was in fact destroyed by plaintiff at time of executing conveyance, as being rescinded thereby; and which said contract of purchase and sale was absolutely rescinded by the execution

of the deed of conveyance. Both parties waiving all rights under any prior agreement, not included in the terms of the conveyance.

19

VI.

Further answering, the defendants state that they admit the granting of a right of way or easement over defendants' property known as "Rio Hondo," but deny that the same was in partial performance of any agreement, and state the fact to be, that the said conveyance was made to the satisfaction of all parties and so accepted at the time and in complete compliance with all understandings, verbal or otherwise, theretofore had between the parties. And defendants further state that it was only subsequent thereto, that the plaintiffs discovered the desirability of having a right of way over Defendants "El Quinto" property, which they had waived by purchasing 207.17 cuerdas instead of 211 cuerdas.

VII.

[NOTARY SEAL.]

The defendants deny the allegations of paragraph seven of the Bill and state the facts to be as heretofore set forth in paragraphs four and five of this answer and they further deny that the plaintiffs have used without any objection on the part of the defendants, the alleged, heretofore mentioned right of way for the 1911-1912-1913 crops—and state the fact to be that they have never allowed the plaintiffs free passage over said right of way and when allowed to any one, has only been allowed under a distinct understanding of defendants' property rights.

VIII.

Defendants deny the allegations of paragraph eighth and allege the fact to be that plaintiffs have a free and easy access to the highway known as the Comerio Road through the public road known as the Scott Road, which they need to traverse but 180 feet and that there is no geographical connection now between the right of way over Rio Hondo and the desired right of way over "El Quinto."

20

IX.

Defendants admit the allegations of paragraph ninth to the effect that they have prohibited the use of said right of way and state that said prohibition was entirely within their rights as they are owners in fee simple of said land, which was not subject to any easement whatsoever.

X.

Defendants deny the allegations of paragraph tenth and state the truth to be as hereinbefore set forth in paragraphs four and five of this answer.

XI.

[NOTARY SEAL.]

Defendants admit the allegations of paragraph eleventh as to the fact that plaintiffs are ready to build their railroad and state that if the refusal of defendants to allow them so to do is to their prejudice and damage, their remedy, if any they have, is in a court of law. And defendants further state that the value of the strip of land in controversy is not one thousand and one hundred dollars (\$1,100), as alleged, but six thousand dollars (\$6,000).

XII.

The defendants further deny the allegations of paragraph twelfth as to the grinding season at the Central Juanita and state that the grinding season at that mill does not begin till well into January and defendants further state as heretofore stated that plaintiffs have free exit through their own land to the Scott Road, which at an expenditure of much less than the loss would be to the defendants, would be rendered perfectly adequate to the plaintiffs for the purposes set forth.

21

XIII.

And for a further and affirmative defense these defendants state that the plaintiffs have often recognized the ownership and dominion of these defendants to the property in controversy and have offered to buy the same, which the defendants would agree to, could an agreement be arrived at as to the price thereof.

XIV.

And for a further and affirmative defense, defendants state from the allegations of the Bill, it appears that the Central Juanita is the real party in interest in this case and it does not appear that there is any comity of interest between these plaintiffs and the Central Juanita or that these plaintiffs are colonos lessees or lessors of the Central Juanita.

[NOTARY SEAL.]

For a further and affirmative defense even if it were true that one of the defendants, Cornelius B. Parker, agreed in any way, form or manner, to grant or allow or consent to the establishment of a right of way over all or a part of the remainder of the estate known as "El Quinto"; as alleged in Article Fourth of the Bill, then defendants allege that such agreement for the establishment of such easement is null and void, inasmuch as Mrs. Janie B. Parker, wife of the said Cornelius B. Parker, was not a party to said agreement, which per se, would alienate and encumber her rights in the afore-said remainder of the estate of "El Quinto" without her consent or permission. The said estate being part of the ganancial property of the conjugal partnership and the said Janie B. Parker being as a matter of law full owner of and undivided half interest in said prop-

erty and said defendant Cornelius B. Parker being as a matter of law incapacitated from encumbering said estate in accordance with Section 159 of the Civil Code of Porto Rico.

22 And for a further and affirmative defense defendants state that the granting of the injunction prayed for and the performance of the alleged contract to grant a right of way will involve ipso facto the variation and alteration of the metes and boundes of the contiguous estates, which if plaintiffs desired to have done could only have been done within the six months after the signing of the deed and taking possession of the property, and as a consequence the right of the plaintiffs so to do has prescribed in accordance with Section 1375 of the Civil Code of Porto Rico.

XV.

[NOTARY SEAL.]

And for a further and final affirmative defense these defendants state that the Bill exhibited herein does not show any equity that their remedy, if any they plaintiffs have is at law, where adequate damages, if they are entitled to any, which defendants deny, can be secured for the breach of any contract, (the existence of which is denied) made prior to the execution of the conveyance and not merged therein. And furthermore if there be any remedy at all in Equity for these plaintiffs it should be in the form of a decree for the Specific Performance of a Contract, after the same has been proven and not in the form of an injunction either temporary or permanent which ousts defendants from the possession of their property and gives it to the plaintiffs.

Wherefore the defendants pray your honor that the Bill against them be dismissed with costs.

San Juan, P'to Rico, January 13, 1914.

(Signed)

O. M. WOOD.

JOS. ANDERSON, JR.

(Signed)

CORNELIUS B. PARKER, AND
For JANIE B. PARKER.

23

Verification.

DISTRICT OF PORTO RICO,

City of San Juan, ss:

Cornelius B. Parker, being duly sworn says as follows:

I am one of the defendants in this action I have read the foregoing answer and know the contents thereof and it is true of my knowledge.

(Signed)

CORNELIUS B. PARKER.

No. 522.

Sworn and subscribed to this 13th day of January, 1914.

(Signed)

FRANCISCO SOTO GRAS.

[NOTARY SEAL.]

Excise Stamp 25 cts.

24

(Filed January 13, 1914.)

In the District Court of the United States for Porto Rico. In
Chancery.

No. 942.

ANTONIO MONROIG et al.

VS.

CORNELIUS B. PARKER et ux.

Statement on Behalf of the Appellants of that Portion of the Evidence which they consider material to the decision of the Appellate Court upon the errors assigned pursuant to their appeal entered in the above cause on the 11th day of April, 1914, which is to be lodged in the office of the Clerk of the court aforesaid according to the provisions of paragraph (b) of Rule 75 of Courts of Equity of the United States.

1. The two contracts in writing introduced in evidence by the complainants and marked as their exhibits "C" and "D," which contracts were severally in the words and figures following, to wit:

"Articles of agreement, made this twenty-eighth day of April in the year one thousand nine hundred and eleven, in the city of San Juan, between Mr. Cornelius B. Parker, resident of San Juan, forty-two years of age, married and administrator by profession, party of the first part; and the Sugar Company or Society known as "The Successors of A. Monroig," party of the second part, represented by Mr. Valentin Monroig, resident of San Juan, twenty-seven years of age, who hereby declares himself authorized duly and legally to enter into this contract, thereby binding not only himself, but the aforesaid company or firm of which he is legal representative:

The aforesaid parties have and hereby do mutually covenant and agree as follows, for and in consideration of the sum of ten dollars true and lawful money of the United States, well and duly paid in hand by the party of the second part to the party of the first part, receipt of which is hereby duly acknowledged:

The party of the first part agrees to sell and the party of the second part to purchase all that tract or parcel of land situated in the municipality of Bayamon and composed of about two hundred acres, a part of the farm known as "El Quinto of Bayamon," now owned by Mr. W. G. Henry, and to be purchased by the party of the first part from the present owner, under agreement of sale dated November three, One thousand nine hundred and ten. Said tract of land to be bought by the party of the second part may be described as follows: Commencing at a point seventy-five feet from the ownership line on the west side of the Comerio Road and running parallel with the road entering to the farm house at Kilometer I Comerio Road, but at a distance sufficient to exclude a rancho now

owned by the party of the first part, proceeding in a northwesterly direction to the Santa Catalina Creek, thence southerly along the said creek to the property of John Edmonds, better known as the Santa Catalina Fruit Company property, thence along the line of aforesaid property to where the road known as the Scott Road intersects; thence along the northern side of said road to a point seventy-five feet from the line of ownership on the Comerio Road, thence northerly along a line parallel with the Comerio Road, and

seventy-five feet from the said ownership line on said road to the point of beginning. This sale shall be consummated in the price of one hundred and twenty-five dollars per acre, which sum the said party of the second part agrees to pay to the party of the first part as soon as the proper documents can be prepared and signed by the parties to this agreement and by the said present owner W. G. Henry.

The transfer of documents and the payment of money to be made at the American Colonial Bank or at any other bank to be selected by the parties hereto.

The cane now on the land is to be purchased by the party of the second part or left free to be arranged for hereafter as parties may elect.

Said party of the second part also agrees to pay all taxes and assessments which shall be taxed or assessed upon said tract of land from the date of June thirtieth, One thousand nine hundred and eleven, thereon and thereafter.

The said party of the first part shall on proffer of the sum to be paid for aforesaid property at the time and in the manner above mentioned, execute and deliver to the said party of the second part, a just and proper title deed to the aforesaid property, and said deed shall be made out in the name of Valentin and Antonio Monroig, should the party of the second part so request.

(Sgd.)

CORNELIUS B. PARKER.

(Sgd.)

VALENTIN MONROIG.

Number 89.

Sworn and subscribed to before me on the 28th day of April, 1911, in the City of San Juan, by Cornelius B. Parker, 42 years of age, married, administrator and a resident of San Juan, and Valentin Monroig, 27 yrs., married, proprietor and a resident of San Juan, both of whom I know personally.

(Sgd.)

O. M. WOOD,
Notary Public."

"O. M. W.

Articles of Agreement, made this twenty-eighth day of April in the year One thousand nine hundred and eleven, in the City of San Juan between Mr. Cornelius B. Parker, resident of San Juan, forty-two years of age, married and administrator by profession, party of the first part; and the Sugar Company or Society known as "The Successors of A. Monroig," party of the second part, repre-

sented by Mr. Valentin Monroig, resident of San Juan, twenty-seven years of age, who hereby declares himself authorized duly and legally to enter into this contract, thereby binding not only himself, but the aforesaid company or firm of which he is legal representative:

The said party of the first part, lessee of the W. G. Henry property known as "El Quinto" de Bayamon, hereby grants to the said party of the second part, a right of way through the property known as "Rio Hondo and El Quinto farms, entering at the Santa Catalina Creek, crossing the Comerio Road from west to east and thence passing through the Rio Hondo plantation, entering, traversing and emerging at points to be determined by the parties to this agreement.

The right of way shall consist of a strip of land not less than four meters and not more than five meters in width.

The party of the second part is to furnish such switches to the cane now planted or hereafter planted by the party of the first part, as he shall request.

28 This agreement is made with the understanding that a prior contract of sale entered into by the parties under this date and relating to the purchase of two hundred acres of land shall be carried out in full, if not then this agreement shall be null and void.

This concession is given under the obligation of the party of the second part to transport only cane to the mill "Central Juanita" in case that the road should ever cease to be used for any other purpose than that of transportation of cane, then this agreement shall be null and void.

VALENTINE MONROIG.
C. B. PARKER.

Copy.
#92."

2. The contract of option of purchase entered into by defendant Cornelius B. Parker with one W. G. Henry covering the land described in the foregoing contracts, together with other land, introduced in evidence by the defendants as their exhibit "L," which was in the words and figures following, to wit:

"Agreement made the Third day of November in the year One Thousand Nine Hundred and Ten, between William G. Henry, of the City of Detroit, Michigan, United States of America, party of the first part, and Cornelius B. Parker, of the City of San Juan, Porto Rico, party of the second part in the manner following:

The said party of the first part in consideration of the sum of One Dollar (\$1), to him in hand paid, receipt of which is acknowledged, and the considerations hereinafter mentioned, does hereby agree to sell and convey unto the said party of the second part, his heirs, executors, administrators or assigns, the following described property, situated in the city of Bayamon, Porto Rico, bounded

and described as follows: Six cuerdas in the barrio of Cerro Gordo bounded on the north and east by the banks of the Rio Hondo, on the south by the land of Narciso Dausa, on the west by the quebrada Cruz. Four hundred and forty cuerdas called Rio Hondo in the barrio of Pajaros, together with the old house situated thereon, bounded on the north by the land of Doña Carmen Arasizamendy, on the south by the estate of Loubriel, on the east by the estate of Don Carlos Mascaro and the farm described in the preceding paragraph, also the estate of Donna Maria Jesus Goenaga, on the west by the highway leading to the village of Sabana del Palmer and Naranjito and the lands of Pedro Dausa. Two hundred and eighty-seven cuerdas in the barrio of Pajaros called El Quinto, formerly Our Lady of Carmen, bounded on the north by the lands of Antanacio Maysonet, now San Niguelo Hermanos. And on the largest part bounded by the Quebrada Santa Catalina, on the south by the highway leading from Bayamon to Comerio, on the east by the said highway and land belonging to Don Pompeyo Olin, on the west by lands of Don Leon and Don Jesus Ramos and the estate of Don Ricardo Hance. These properties being also described in a contract of lease made between the parties to this agreement, dated September 14, 1906, which said contract is of record in the Register of Deeds' Office, in the City of San Juan, Porto Rico, said contract being executed by Gabriel Guerra, Notary for Porto Rico, Mr. N. B. K. Pettingill representing the party of the first part, as his attorney. The property mentioned in said contract of lease being the property intended to be affected by this agreement.

Said party of the first part for himself, his heirs, executors, administrators, or assigns, hereby agrees to sell and convey to the party of the second part for the sum of Thirty-Seven Thousand Dollars (\$37,000) in gold currency of the United States the property herein described, provided payment in full of that

amount shall be made in cash by the first day of May, 1911.

In case said party of the second part shall not exercise said option and pay said Thirty-Seven Thousand Dollars (\$37,000) on or before May 1st, 1911, then it is further agreed by said party of the first part that he will at any time within two (2) years from the date of this agreement, sell and convey to said party of the second part, said above described property for the sum of Forty Thousand Dollars (\$40,000), gold coin of the United States of America, on the following terms and conditions: Ten Thousand Dollars (\$10,000) in cash at the time of the execution and delivery by said party of the first part to said party of the second part of a deed for said premises and six notes to be given at the same time by said party of the second part payable to the party of the first part or his order, dated as of the date of the deed to said premises, each for the sum of Five Thousand Dollars (\$5,000), payable respectively one, two, three, four, five, and six years after their date, and all bearing interest at the rate of six (6) per cent. per annum, payable semi-annually; and to secure said notes said party of the second part shall deliver to said party of the first part at the same time a trust

deed or mortgage upon all of the above described property to be executed and delivered by said party of the second part, and his wife, and to be acknowledged and recorded, all in accordance with the laws of Porto Rico where said property is located.

It is further understood and agreed that all payments to be made by said party of the second part under this agreement shall be made to the party of the first part or his assigns at such place as the party of the first part may designate in the City of New York, United States of America, in gold coin of the United States, or current exchange payable in said City of New York at par.

It is further understood and agreed that the mortgage above mentioned to be given by the party of the second part to secure the deferred payments evidenced by said notes shall be a legal, valid, first lien upon the property above described.

It is further expressly understood and agreed that time shall be of the essence of this contract, and in the event that the option given by the party of the first part to the party of the second part hereunder shall not be exercised, as aforesaid, within two (2) years from the date of this agreement, then this agreement shall be absolutely null and void and said party of the second part shall have no interest or right in said property above described, except such as may be given him under said lease as aforesaid.

It is understood and agreed between the parties to this agreement that no provision made herein shall affect the contract of lease heretofore described and that said lease is to continue in force as originally made unless and until one of the options above described shall be exercised and title to said property shall vest in the party of the second part.

In witness whereof, party of the first part has set his hand and seal at Chicago, Illinois, United States of America, this Third day of November, 1910.

(Sgd.)

WILLIAM G. HENRY. [SEAL.]

STATE OF ILLINOIS,

County of Cook, ss:

On this Third day of November, One Thousand Nine Hundred and Ten, before me, a Notary Public, in and for said County of Cook and State of Illinois, personally came William G. Henry, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he thereupon duly acknowledged to me that he had executed the same as his free act and deed for the purposes therein set forth.

(Sgd.)

[NOTARY'S SEAL.]

JAMES A. TRUMBULL,
Notary Public."

3. The right of way deed executed by the defendants in favor of the complainants on the 19th day of August, 1911, introduced in evidence by the complainants as their Exhibit "F," a true translation of which is in the words and figures following, to wit:

"Number Sixty Three.

Constitution of an Easement.

In the City of San Juan, Capital of Porto Rico, on the 19th of August, 1911, before me, Frank Antonsanti Capo, Lawyer and Notary Public, with vicinity and residence therein, there appears for the purpose of entering into a contract for the constitution
33 of an easement.

The party of the first part, Mr. Cornelio B. Parker, forty two years of age, together with his wife Mrs. Janie B. Parker, of 40 years of age, property owners and residents of this neighborhood.

And the party of the second part, Don Antonio Monroig y Ob-
rador, of 30 years of age, married to Doña Consuelo Falbe, property owner and resident of San Juan.

The parties having in my judgment the legal capacity necessary for executing this document, set forth.

Property.

First. Mr. Cornelio B. Parker is the owner of the following described property:

Farm with a house thereon in bad condition, named Rio Hondo, situated in the ward of Pajaros, in the municipality of Bayamon, consisting of 444 cuerdas of land, equivalent to 174 hectares, 49 ares, and 20 centiares. It is bounded on the north by lands of Doña Carmen Aranzamendi, on the south by those of the Loubriel estate, on the east by the estate of Don Carlos Mascaro, lands of William G. Henry, now C. B. Parker, and the estate of Doña Maria Jesus Goenaga, and on the west by the road leading to the towns Sabana del Palmar, now Comerio, and Naranjito, and lands of Don Pedro Daussa, now the Comerio road.

Title.

Second. This property was acquired by Mr. William G. Henry through a deed dated February 20th, 1902, executed before the notary, resident of this city, Don Mauricio Guerra, and recorded in the Registry of Property at folio 247, volume 20 of this capital, property number 2172, quintuplicate, inscription 17th, and
34 Mr. Cornelio B. Parker acquired same by purchase from Mr. William G. Henry and his wife according to deed executed on this day in this capital before the notary O. M. Wood.

Constitution of an Easement.

The parties hereto further set forth, that they have agreed to constitute an easement of right of way over the property belonging to the Parker spouses, described in fact first of this deed and the parties having agreed as to the conditions of said easement carry the same into effect under the following clauses:

First. Mr. Cornelio B. Parker, with the express consent of his wife now present, constitutes upon the above described property an

easement for the right of way of a railroad track of entrance and outlet, in favor of Don Antonio Monroig Obrador, his heirs, assigns, successors or representatives.

Second. For the purposes of this easement Mr. Monroig shall have a right to lay upon the strip of land covered by this easement, a railroad track, and to that end he shall designate said strip of land of a width of five meters, which starting from the old road where the same crosses the Comerio road in a southerly direction along a distance of 300 feet; and thence in a distance not less than 100 feet from a swamp, in a westerly course up to the banks of the Rio Hondo river, thence in a westerly course following the river up to a swamp and crossing both in a southerly course until it reaches the boundary line of Luis Medina.

Third. This easement is granted by the Parker spouses for and in consideration of the sum of one hundred dollars which they acknowledge having received from the hands of Mr. Monroig prior to this act, and the same is constituted definitely and forever.

Fourth. Mr. Monroig shall pay to the Parker spouses what-
35 ever damages may be caused to the canes of the latter on account of the hauling and transportation of materials in connection with the building of said track.

Fifth. It is agreed that in case that a tramway or trolley line be constructed in the future across said property parallel to the Comerio road, Mr. Monroig shall consent to the crossing of his track by that of the trolley line, to be laid on the trip of land upon which this easement is constituted.

Sixth. Mr. Monroig shall use the track for the purpose of hauling cane either from his property or that of his colonos, as well as the rolling stock for the operation of said line to the Central Juanita of Bayamon.

Seventh. In case that Mr. Monroig, his heirs, successors, assigns or representatives should fail to use this easement for the purposes stated, the same shall be forfeited, and the land shall be occupied again by Mr. Parker or his successors in interest.

They so stated and grant in the presence of the witnesses, residents of this city, Mr. O. M. Wood and Don Juan Guzman Benitez, to me known.

The parties hereto read this deed and find the same satisfactory, and I read it to the witnesses who waived their right to read it themselves, of which they were advised. All have hereunto set their hands together with me, the notary, who gives faith that the contracting parties are known to him, as well as to all that has been affirmed or recited in this public instrument. At this stage the contracting parties set forth that in order to make more clear clause second of this deed within the true intention of the parties, they desire and consent that the said clause be drawn up as follows:

The width of the strip of land for the right of way of the
36 railroad line and which constitutes the zone of the present easement, shall be five meters, excepting such places along said line where on account of the cuts and fillings it may become

necessary to widen said strip of land. Of all of which I give faith, as aforesaid.

(Signed)

CORNELIO B. PARKER.
 JANIE B. PARKER.
 ANTONIO MONROIG.
 O. M. WOOD.
 JUAN GUZMAN BENITEZ.
 FRANK ANTONSANTI.

(Signed)

The foregoing is a true and correct copy of the original of its contents, which, under number 63, appears in the current protocol of this notarial office, in my charge. And at the request of Mr. Antonio Monroig, I issue the present first copy which I mark and sign on the same day, month and year of its execution.

FRANK ANTONSANTI."

And defendants pray the Court to approve the foregoing statement of the evidence pertinent to the consideration of the errors assigned by them on this appeal and to order the same made a part of the record in said cause.

N. B. K. PETTINGILL,
Of Counsel for Appellants.

Approved as prayed, and ordered that the portion of the evidence included therein be made a part of the record in said cause for the purposes of said appeal. Done and ordered in San Juan this 26th day of October, 1914.

P. J. HAMILTON, *Judge.*

[Endorsed:] U. S. District Court, District of Porto Rico. Antonio Monroig et al. vs. Cornelius B. Parker et al. Statement of Case on Appeal.

37 In the District Court of the United States for Porto Rico.

(Filed March 20th, 1914.)

No. 942. Equity.

ANTONIO MONROIG et al., Complainants,

vs.

C. B. PARKER et al., Defendants.

San Juan.

Bill for Specific Performance.

Frank Antonsanti, Solicitor for Complainants.

Jos. Anderson, Jr., and O. M. Wood, Solicitors for Defendants.

HAMILTON, J.:

This suit was a case originally brought in law before the Insular district court of San Juan by the complainants herein and removed

by the defendants to the United States District court. In order to conform to the pleadings of the new jurisdiction, what was called a reformed complaint was filed on the chancery side of this court on November 6, 1913. The complaint or bill in the case alleges in effect that defendant Cornelius B. Parker was, prior to April 28, 1911, the lessee from one Henry of two pieces of land called "El Quinto," bounded south by the road from Bayamón to Comerio, and "Rio Hondo" on the south side of the same road, and that said defendant had the option to purchase from the owner. That the complainants were and are the owners of a sugar central near Bayamón known as "Juanita," and as such desired to extend a railroad to and across the Comerio Road in order to reach new cane territory. That this led to negotiations with defendant C. B. Parker, who was willing to give the right of way over the "Rio Hondo" plantation, provided complainants would buy the bulk of the Quinto estate, leaving a strip of land in Parker for urbanization along the north side of the Comerio Road, intersected, however, by the right of way in question, which would allow the complainants to operate the railroad 38 desired. On April 28, 1911, a written agreement was accordingly made between Parker and the complainants represented by Valentin Monroig in the following words:

"Articles of agreement, Made this twenty-eighth day of April in the year One thousand nine hundred and eleven, in the City of San Juan between Mr. Cornelius B. Parker resident of San Juan, forty-two years of age, married and administrator by profession, party of the first part, and the Sugar Company or Society known as "The Successors of A. Monroig," party of the second part, represented by Mr. Valentin Monroig resident of San Juan, twenty-seven years of age, who hereby declares himself authorized duly and legally to enter into this contract, thereby binding not only himself; but the aforesaid company or firm of which he is legal representative.

The said party of the first part, lessee of the W. G. Henry property known as "El Quinto" de Bayamón, hereby grants to the said party of the second part, a right of way through the property known as "Rio Hondo" and "El Quinto" farms, entering at the Santa Catalina creek, crossing the Comerio Road from west to east and thence passing through the "Rio Hondo" plantation, entering, traversing and emerging at points to be determined by the parties to this agreement.

The right of way shall consist of a strip of land not less than four meters and not more than five meters in width.

The party of the second part is to furnish such switches to the cane now planted or hereafter planted by the party of the first part, as he shall request.

This agreement is made with the understanding that a prior contract of sale entered into by the parties under this date and relating to the purchase of two hundred acres of land shall be carried out in full, if not then this agreement shall be null and void.

This concession is given under the obligation of the party of the second part to transport only cane to the mill "Central Juanita" in case that the road should ever cease to be used for any other purpose

than that of transportation of cane, then this agreement shall be null and void."

These were signed by all parties except defendant Janie B. Parker. The question in this case is, has this agreement been carried out, and if not, is it such that can be enforced by specific performance in this court? Defendant C. B. Parker proceeded to get in the tile of Henry, and on August 19, 1911, the parties signed deeds looking to carrying out the agreement. These consisted of two formal instruments,—a deed conveying two hundred and seven and 7/100 cuerdas (being the Quinto property less the strip), and a separate deed of an easement over the Rio Hondo property; but there was no deed signed for a right of way over the seventy-five foot strip reserved by Parker on the North side of the Comerio Road.

Complainants allege that this was an oversight, and seek to have the instrument reformed or another one executed to
39 cover this alleged mistake. Defendants deny that there was any mistake, and say nothing further was done because the complainants had got all that they wished. They refuse to make any such grant now for several reasons. In the first place, they say that Janie B. Parker was not a party to the contract of purchase, dated April 28, 1911, and is therefore not bound to sign anything further; and in the second place, that there is a remedy at law, and third that complainants are not in condition to seek reformation and specific performance, because they did not take all the land which the survey shows they had contracted to take.

The matter of dissolution of the preliminary injunction is not now material, because the case comes up upon the merits, both sides having taken full testimony.

1. The Civil Code of Porto Rico governs questions of land title and this extends the local ganancial law to all real property. This law will be found in Sections which are as follows:

"SECTION 1316. To the conjugal partnership belong:

1. Property acquired for a valuable consideration during the marriage at the expense of the partnership property, whether the acquisition is made for the partnership or for one of the spouses only.

2. That obtained by the industry, salaries, or work of the spouses or of either of them.

3. The fruits, income, or interest collected or accrued during the marriage, coming from the partnership property, or from that which belongs to either one of the spouses."

"SECTION 1322. All the property of the marriage shall be considered as partnership property until it is proven that it belongs exclusively to the husband or to the wife."

"SECTION 1327. The husband is the administrator of the conjugal partnership."

"SECTION 1328. Notwithstanding the power which the husband has a- administrator he shall not have the power to give, to sell and to bind for a consideration the real estate of the conjugal partnership, without the express consent of the wife.

Every sale or agreement which the husband may make in respect to the said property in violation of this section and the other provis-

ions of this Code, ir in fraud of the wife shall be null and shall not prejudice her or her heirs."

40

2. Complainants allege that this law does not apply to an American citizen not domiciled in Porto Rico. There might be some question on the evidence as to where the domicile of the defendants is, but that is not material. The *lex rei sitæ* governs all matters relating to real property. Unless a foreigner is prohibited from owning land, or except so far as conditions are affixed to his ownership, he holds land in Porto Rico upon the same title as any one else. It is not material whether he comes to Porto Rico to live or not. Whatever rights in real property are given to a married woman by the Porto Rican law apply, so far as relates to the land owned, to the wife of the land owner, whether she ever comes to Porto Rico or not. There cannot be two laws governing the same real property at the same time. The law of New York will govern defendant Janie B. Parker as to all lands located in New York, but have no extraterritorial effect and cannot apply to her interests here. *Danner vs. Brewer*, 69 Ala., 192; *Bouvier Law Dictionary*, S. V., *Lex Rei Sitæ*; *Story, Conflict of Law*, Sec. 454.

3. Under the Porto Rican law it is unquestionably necessary that the wife join in a conveyance of land or easement, and the defendant urges the non-joinder of Janie B. Parker in the April contract of sale as a reason for not compelling her to correct any omission, if there be any, in the conveyances of August 19, 1911.

The evidence seems to show that at the time the contract was made Mrs. Parker had no interest in the property. Her husband was the lessee with a right of purchase, and until this right was exercised there was nothing to which her ganancial right could attach. The testimony seems to be that the money which defendant C. B. Parker obtained from the complainants was used to carry out this right of purchase, and, that but for payment of complainants' money there would not have been anything to which Mrs. Parker's rights could attach. The point, therefore, is, can it be allowed in a court

41 of equity for a married woman to acquire an interest in land incidental to her husband's purchase by means of money paid by another for her husband to buy the land, and then refuse to join in the deed of part of it to this third party as contemplated in the arrangement made by her husband? To state the question is equivalent to answering it. The wife in such case is not a third party in any sense under the Porto Rican law, nor a bona fide purchaser for value in any sense under the principles of equity. Whatever right Janie B. Parker acquired in this land was under and in subordination to the contract of purchase and sale made by her husband. It would be inequitable to permit her to set up such a defense. It is as when land is bought with a vender's lien on it for the purchase money. The object of a court of chancery is to confine parties to an equitable use of their rights, and not to permit them to enforce legal claims in such cases as this.

4. The parties must, therefore, be held to be properly before the court and subject to its jurisdiction. The main question, however, is, what are their rights under the testimony in this case? The evi-

dence seems to show that the original object of the complainants was not the purchase of land, but the running of a railroad through both tracts of land leased to defendant Parker, and that this was changed into a purchase of the larger part of "El Quinto," as the condition on which defendant Parker would permit the running of a railroad through the rest of his lands. Admitting, for the sake of argument, that the defendants did carry out their contract, the evidence seems to show that omitting the execution of a deed of easement from "El Quinto" to the Comerio Road was a mistake. The Parkers did not at the time of the execution of the deed object to making such a conveyance, and there is no reason to suppose that they would have objected at that time. The notary who superintended the drawing of the papers was unfamiliar with the details and the evidence seems to show that it was a mistake on his part, and nothing else, which caused the failure to draw a third instrument embracing this right of way as a link, or to embrace it in the
 42 right of way which covered the land on the south side of the road.

There is evidence that nothing was said about it for some time, and also evidence that one of the Monroigs who was not familiar with transaction made some effort to adjust the matter, perhaps even to buy the right of way over again; but the evidence convinces the court, that, however this may be, the right already existed to this right of way. Waterman, Spec. Performance, #491.

5. It is urged by the defendant, that, at most, this constituted a breach of contract, for which the law affords redress by way of damages. To this the court cannot assent. It is, of course, possible that there can be a money compensation for the loss of this right, as it is conceivable that there might be a money compensation for the loss of almost any other right. It is held that there can be no specific performance unless damages would lie. *Comer vs. Bankhead*, 70 Ala., 493. But to prevent the equitable remedy, that at law must be adequate. A remedy to be adequate at law must give a substantial equivalent for what is asked in equity. It is sufficient for specific performance that the ends of justice can be subserved only in this way. Waterman, Spec. Performance, #12. It would seem from the pleadings and the evidence that the original contract contemplated a railroad line through "El Quinto" and "Rio Hondo" at the point which is now in controversy. Cutting a railroad in two is not a matter which is fairly susceptible of adequate damages for the reason that it could no longer be operated as a railroad.

6. It is further argued that the complainants would have an adequate remedy by carrying their railroad further to one side and passing up what is called the Scott Road to the "El Quinto" property. If, however, the contract is for connecting two pieces of property by a railroad, or, in other words, for a railroad which shall cross both of them in its operation, this will not be met by a
 43 railroad which must go outside of both properties in order to pass from one to the other and by a route which, so far as the evidence shows, was not contemplated at all. Moreover, this substitute would require complainants to pass over the Scott Road, and

there is no evidence that the Scott Road belongs to them and no evidence that whoever it does belong to would permit a railroad to be operated along it. If it be a public road, there must be permission obtained from public authorities, and that would be introducing an element into the case which was not provided by the original contract.

7. It is held that the contract must be fair, for a specific thing, concern- real property, and the complainant must himself have performed his part. Walker Am. Law, 700; 72 Ala., 80. Specific performance, furthermore, is less a matter of right in the complainant than of discretion of the court. Story Eq. Jur., #742; Rose vs. Henderson, 59 So. Rep., 38, (Fla.) Great accuracy of averment and proof are required. Meyer vs. Mitchell, 75 Ala., 482. These prerequisites exist in the case at bar. There is in the mind of the court little or no doubt that the original plan was to pass over the strip of land now in dispute, that this has been wrongfully prevented by the defendants and not by any fault of the complainants, and that no remedy is adequate except carrying out the contract itself.

8. The defense upon the facts is that the complainants did not carry out their side of the contract in that they did not take some three cuerdas or more of "El Quinto", and that, therefore, they could not in equity be permitted to have specific performance of a contract which they themselves have not fully carried out. There is no question that there must be a mutuality of obligation and performance in order to justify a decree of specific performance. Dorsey vs. Packwood, 12 How., 126; Hunt vs. Rhodes, 1 Peters, 1.

44 The pleadings do not allow us to go into the matter of variation of the contract. There is, on the one hand, no offer in the bill to do equity by paying for any land which, if included in the contract, was not included in the deed, and on the other hand, there is no counter claim in the answer looking to specific performance by having the complainants pay any sum of this land which they did not take. The parties seem to rest their case entirely upon the facts as they stand, the complainants alleging compliance and the defendants alleging non-compliance with the contract of April 28, 1911.

The facts seem to be, that, while the contract called for the retention by Parker of a strip seventy-five feet wide on the north side of the Comerio Road (less the right of way now in question), this was upon the erroneous idea that the Comerio Road was straight. This answer says a rectangular strip seventy-five feet wide was retained. The road not being straight, however, the engineers varied the shape of the strip retained in order to give Parker a depth of seventy-five feet at the narrowest point. It would require considerable particularity in survey and description to run a line parallel to the Comerio Road and following its curves, and so, instead, the plan was adopted of running a straight line from a point seventy-five feet from the road at one end and which would and did come out at the other end on what is called the Scott Road some one hundred and sixty or one hundred and seventy feet from the Comerio Road. All this seems to have been considered on the 19th of August, 1911, and the deed was executed accordingly, the attorney for the complain-

ants saying that they had all the land that they wanted, and the defendants making no objection to the form of the deed. The defendants now allege, however, that they took the omission to embrace three or four cuerdas of land in the deed as the equivalent for not enforcing the right of way over the strip of land now in controversy.

45 A careful examination of the evidence relating to the execution of the deeds fails to show anything that would justify this belief. It was not so expressed at the time by either party. If the deed covered less land than the defendants understood they were selling, they should have declined to execute it and alleged that ground for not going further. This they did not do. In point of fact the contract of April 28, 1911, which the parties were then carrying out, only called for two hundred cuerdas of land, and in taking two hundred and seven cuerdas the complainants were certainly substantially performing their obligation. There cannot be said to be a substantial variance between the contract and its performance on the part of the complainants. Waterman Spec. Performance, Sec. 128.

As the pleadings and evidence do not fully cover the question of boundary at the Scott Road, this is a matter of law and of survey, and is not necessarily involved in the present litigation; and nothing is to be held as decided on that point.

It follows, therefore, that the complainants are entitled to relief, and a decree will be entered to that effect, establishing the right of way sought in the bill and making permanent the temporary injunction. As there seems, however, to have been room for an honest difference of opinion in the matter, each party will pay his own costs.

It is so ordered.

[SEAL.] (Signed) PETER J. HAMILTON, *Judge*.

San Juan, P. R., Mch. 19, 1914.

46 In the District Court of the United States for Porto Rico.

(Filed March 24, 1914.)

Equity. 942.

ANTONIO MONROIG et al.

vs.

CORNELIUS B. PARKER and JANIE B. PARKER.

Final Decree.

This case came on to be heard upon the pleadings, evidence adduced by the parties, argument and brief of Counsel for the respective parties, and the Court being fully advised in the premises, orders adjudges and Decrees:

That the complainants Antonio Monroig, Josefa O. Monroig, Agustina S. Monroig and her husband Albert S. Menéndez all of lawful age, and José A. Lopez Monroig a minor are entitled to the

relief prayed for in their bill, and, therefore, are entitled to an easement or right-of-way over that portion of "El Quinto" property remaining in possession of the defendants Cornelius B. Parker and his wife Janie B. Parker after deducting the 207.17 cuerdas at present belonging to Complainants described as follows:

"Rustic estate containing 69 cuerdas of land, more or less, situated in the barrio of Pajaros, Municipality of Bayamon, bounded on the North by the portion sold to plaintiff Antonio Monroig and the quebrada "Santa Catalina"; on the East by the Comerio Road; on the South, by Antonio Monroig, the Scott Road and, the Comerio Road, and on the West by the Sucesión Monroig, (The plaintiff herein)."

It is further ordered, adjudged and decreed, that said easement shall be established on and over a portion of the above described property and to be known as the servient estate for the benefit of the dominant estate belonging to complainants herein described as follows:

"A tract of land situated in the barrio of Pajaros, Municipality of Bayamón, containing 207 cuerdas and 17/100 of another, bounded on the North by the Creek known by the name of "Quebrada Santa Catalina" and property of C. B. Parker; on the East by lands of C. B. Parker; on the South by the same lands belonging to C. B. Parker and the Scott Road, and on the West, by the said Scott Road, and the Santa Catalina Fruit Company, formerly Lucas A. Scott."

The servient estates containing 69 cuerdas more or less described firstly above, is the balance of and the Dominant estate containing 207 cuerdas and seventeen hundredths of another described immediately hereinbefore is a segregation from the following and principal estate:

"Rustic estate known as "El Quinto", situated in the barrio of Pajaros, Municipality of Bayamón, containing 287 cuerdas 16 hundredths of land, bounded on the North by lands of Atanasio Maysonet, at present San Miguel Hermanos and the Quebrada Santa Catalina; on the South by the Comerio Road; on the East by lands of Pompeyo Oliú, and on the West by lands of Leon and Jesús Ramos and the Sucesión of Ricardo Hance".

And it is further ordered, adjudged and decreed that said easement shall be predial, discontinuous and perpetual in character, measuring five meters wide by about seventy five feet long more or less, the exact length of which is the distance measuring from the southern boundary line of the Dominant estate to the Comerio Road, and particularly at a place between lot number 285 belonging to Enrique Guerra and lot number 291 belonging to Tomasa Ortega, as designated on a certain urbanization plan of the balance of "El Quinto" belonging to defendants and which said strip of land to be used as an easement, and which the evidence showed to belong to the defendants, is described as follows:

"A strip of land 5 meters wide by 75 feet long more or less, bounded on the East or right hand side entering from the Comerio Road by property which belongs to defendants C. B. Parker separating the easement strip from lot number 285 property of Enrique Guerra; on the South by the Comerio Road, on

the West by property of C. B. Parker which separates the easement strip from lot number 291 property of Tomasa Ortega and on the North by property of the complainants herein, which is the Dominant estate".

And it is hereby further decreed that the complainants shall have the right to construct, maintain and operate a railroad line on the above described and designated strip of land in connection with and as a part of the main line of their said railroad leading to the "Central Juanita" in the District of Bayamón, and in such manner as may be necessary for the full enjoyment thereof for the purpose of transporting sugar cane thereover.

And it is hereby further ordered that this decree shall serve as sufficient title of easement, and that a certified copy thereof be issued by the Clerk of this Court under the seal thereof to the complainants herein for the purpose of recording the same in the proper Registry of Property.

And it is hereby further decreed that the preliminary injunction heretofore granted herein on the Tenth Day of November 1913, be made permanent and perpetual and that the defendants Cornelius B. Parker and Janie B. Parker, their agents, servants, and attorneys, and each of them be, and they are hereby, perpetually enjoined and restrained from interfering with complainants in the construction, maintenance or operation of said railroad line and the enjoyment and free use of the said strip of land described hereinbefore for the purpose herein set forth.

It is further ordered, adjudged and decreed that each party herein pay its own costs.

[SEAL.] (Signed) PETER J. HAMILTON, *Judge*.

San Juan, P. R., March 24th, 1914.

49 In the District Court of the United States for Porto Rico.

(Filed April 11th, 1914.)

No. 942. Equity.

ANTONIO MONROIG et al.

VS.

C. B. PARKER et al.

San Juan.

To the Hon. Peter J. Hamilton, District Judge:

The above-named defendants feeling themselves aggrieved by the decree made and entered in this cause on Tuesday, the twenty-fourth of March, 1914, do hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith and they pray that their appeal may be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers

upon which said decree was based, duly authorized may be sent to the United States Supreme Court, sitting at Washington.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their said appeal, be made.

(Signed)

O. M. WOOD,
WILLIS SWEET,
Solicitors.

50 In the District Court of the United States for Porto Rico.

(Filed April 11th, 1914.)

942. Equity.

ANTONIO MONROIG et al.

vs.

CORNELIUS B. PARKER et al.

Come the respondents and file a petition for an appeal to the Supreme Court of the United States and an assignment of errors accompanying the same, which petition upon consideration, is granted; and the Court allows an appeal from the final decree entered herein upon respondents filing a bond in the sum of five hundred dollars (\$500.00) with good and sufficient security to be approved by the Court.

50a In the District Court of the United States for Porto Rico.

#942. Equity.

ANTONIO MONROIG et al.

vs.

CORNELIUS B. PARKER et al.

Journal Entry of October 29th, 1914.

The respondents' motion to substitute a short assignment of error for the one previously filed on the 11th day of April 1914 being considered by the court, the complainant consenting thereto, is granted, and said short assignment of errors is ordered to be filed take the place, and substitute the aforesaid one, heretofore filed.

51

(Filed October 29, 1914.)

In the District Court of the United States for Porto Rico.

In Chancery.

No. 942.

ANTONIO MONROIG et al.

vs.

CORNELIUS B. PARKER and Wife.

Come the defendants Cornelius B. Parker and Janie B. Parker, his wife, now appellants herein, and, hereby withdrawing the assignment of errors heretofore filed herein, present and file the attached as an amended assignment of errors, to be substituted for said original assignment now withdrawn, to wit:

I.

The Court erred in overruling the motion of defendants to dismiss the bill of complaint.

II.

The Court erred in failing to sustain the legal defense based upon Section 1328 of the Civil Code of Porto Rico, as set up in paragraph XIV of the answer of these defendants.

III.

The Court erred in failing to sustain the legal defense of prescription based upon Section 1375 of the Civil Code of Porto Rico, as set up in the same paragraph of the answer of defendants.

IV.

The Court erred in entering a decree in favor of complainants specifically enforcing the contract described in complainants' bill, because said contract was between complainants and defendant Cornelius B. Parker alone.

52

V.

The Court erred in entering a decree in favor of complainants specifically enforcing said contract, because the same was void and unenforceable under the laws of Porto Rico, where it was made and was to be performed.

VI.

The Court erred in entering its decree granting to the complainants an easement discontinuous and perpetual in character over the land of defendants in said decree described, because the contract upon

which complainant's bill was based did not provide for an easement of that character.

VII.

The Court erred in not entering a decree dismissing the bill of Complaint, because the same was founded upon a contract unenforceable as against defendant Janie B. Parker, and no conveyance as prayed for could legally be made by defendant Cornelius B. Parker alone.

Wherefore appellants pray that said final decree may be reversed and set aside and complainants' bill ordered dismissed.

N. B. K. PETTINGILL,
Counsel for Appellants.

52a In the District Court of the United States for Porto Rico.

(Filed October 26th, 1914.)

In Chancery.

No. 942. San Juan.

ANTONIO MONROIG et al.

vs.

CORNELIUS B. PARKER et al.

Bond on Appeal.

Know all men by these presents, that we, Cornelius B. Parker as principal and the Fidelity and Deposit Company of Maryland as surety, are held and firmly bound unto Antonio Monroig, Josefa O. Monroig, Agustina Monroig and José Antonio Lopez Monroig, appellees herein, their executors, administrators and assigns, in the penal sum of five hundred dollars (\$500) for the payment whereof well and truly to be made we do bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Signed and sealed with our seals and dated this 21st day of October, A. D. 1914.

Whereas lately in the District Court of the United States for Porto Rico at a session held on the 24th day of March, 1914, in a suit depending in that Court wherein the above named appellees were complainants and the above bounden Cornelius B. Parker, with Janie B. Parker, his wife, were defendants, numbered and entitled as above, a final decree was rendered against the said defendants, and the said defendants have been allowed an appeal therefrom to the Supreme Court of the United States for the purpose of reversing said decree.

Now, the condition of the above obligation is such that, if the said Cornelius B. Parker and Janie B. Parker shall prosecute their appeal to effect and shall answer all costs, if they fail to make their

plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) CORN-LOIUS B. PARKER, [SEAL.]
Personally and as Attorney in Fact for Janie B. Parker.

[Seal of the Fidelity and Deposit Co. of Md.]

FIDELITY AND DEPOSIT CO. OF MD.,
Surety,

(Signed) By F. M. WELTY, *Agent.*

(Signed) R. H. TODD, *Attorney in Fact.*

Approved by me, this 26 day of October, A. D. 1914.

(Signed) P. J. HAMILTON,
 [SEAL.] *Judge U. S. District Court for Porto Rico.*

52b ISLAND OF PORTO RICO,
City of San Juan, ss:

On this twenty-third day of October A. D. 1914, before the undersigned, a Notary Public in said city of San Juan, Porto Rico, duly commissioned and qualified, came Frank M. Welty as agent and Roberto H. Todd as attorney in fact, of the Fidelity & Deposit Company of Maryland to me personally known to be the individuals and officers who executed the foregoing instrument, and they each acknowledge executing the same for and on behalf of the Company and for the uses and purposes therein mentioned, and being by me duly sworn, severally and each for himself, depose and sayeth, that they are the said officers of the company aforesaid, and that their signatures as such officers were duly affixed and subscribed to said instrument by the authority and direction of the said corporation given in the power of attorney executed by said company on the sixteenth day of June 1914 original of which is on file in the office of the Treasurer of Porto Rico.

File No. 1961.

Subscribed and sworn to before me by Frank M. Welty of Porto Rico a resident of San Juan whom I know personally, this twenty-third day of October 1914.

(Sgd.)

JUAN GUZMAN BENITEZ,
Notary-Public.

Here appears an Internal Revenue Stamp of twenty-five cents.

52c

(General.)

Power of Attorney.

Fidelity and Deposit Company of Maryland,
 Home Office: Baltimore, Maryland.

Know all Men by these Presents:

That the Fidelity and Deposit Company of Maryland, by Fred S. Axtell, its Vice-President, and Wm. R. Bishop, its Assistant Secre-

tary, in pursuance of authority granted by Section 3, Article VI, of the By-Laws of said Company, a copy of which section is hereto attached, does hereby nominate, constitute and appoint R. H. Todd, Fco. Ramirez de Arellano, Frank M. Welty and Joaquin M. Torres, all of San Juan, Porto Rico, its true and lawful agents and attorneys-in-fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed, all bonds or undertakings required by Order or Decree of any Court of Law or Equity of Porto Rico.

Also, all bonds on behalf of Internal Revenue or Deputy Internal Revenue Collectors, in Porto Rico.

Also, all bonds required to be given to the Insular Government of Porto Rico, or to the Treasurer of Porto Rico.

Also, all bonds or undertakings, required in Porto Rico, guaranteeing contracts for the erection of public or private buildings or improvements, contracts for public or private work, and contracts for supplies.

Also, bonds required to be given to any Municipality in Porto Rico, by Public Officers, whether elected or appointed.

Such bonds to be signed for the Company by either said R. H. Todd or Fco. Ramirez de Arellano, as attorney-in-fact, and attested, as agent, and the seal of the Company affixed by either said Frank M. Welty or Joaquin M. Torres. And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

In witness whereof, the said Fred S. Axtell, Vice-President, and Wm. R. Bishop, Assistant Secretary, have hereunto subscribed their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland, this 16th day of June A. D. 1914.

[Seal Fidelity & Deposit Company of Maryland, Incorporated 1890.]

FRED S. AXTELL,
Vice-President.

Attest:

W. R. BISHOP,
Assistant Secretary.

STATE OF MARYLAND,
City of Baltimore, ss:

On this 16th day of June A. D. 1914, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified came Fred S. Axtell, Vice-President, and Wm. R. Bishop, Assistant Secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed, the preceding instrument, and, they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Com-

pany aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signature- as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

[Seal William M. Reinhardt, Notary Public, Baltimore, Md.]

WM. M. REINHARDT,
Notary Public.

Extract from By-Laws of the Fidelity and Deposit Company of Maryland, Adopted by the Stockholders of said Company on January 14th, 1913.

"ARTICLE VI, SECTION 3. The President, or any of the Vice-Presidents, elected by ballot from the members of the Board of Directors shall have power by and with the concurrence of the Secretary or any of the Assistant Secretaries, to appoint any attorney-in-fact or to authorize any person or persons to execute on behalf of the Company, any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgages, contracts, agreements and policies, and to affix the seal of the Company thereto".

I, Wm. R. Bishop, Assistant Secretary of the Fidelity and Deposit Company of Maryland, hereby certify that the foregoing is a true copy of Section 3, Article VI, of the By-Laws of Said Company, and is still in force.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the Corporate Seal of the Fidelity and Deposit Company of Maryland, this 16th day of June, A. D. 1914.

[Seal Fidelity & Deposit Company of Maryland, Incorporated 1890.]

W. R. BISHOP,
Assistant Secretary.

53 In the District Court of the United States for Porto Rico.

(Filed May the 4th, 1914.)

942. Equity.

ANTONIO MONROIG et al.

vs.

CORNELIUS B. PARKER et al.

This cause comes on to be heard upon the motion of the Respondents for an Extension of time to perfect the appeal taken

herein. The Court grants the motion and the time within which to perfect their appeal is extended 30 days.

54 In the District Court of the United States for Porto Rico.

(Filed May 25th, 1914.)

942. Equity.

ANTONIO MONROIG et al.

vs.

CORNELIUS B. PARKER et al.

Come the respondents by O. M. Wood one of their Solicitors and moves the Court to be allowed an Extension of time to perfect the appeal taken herein and to prepare the transcript of record in the case. The Court grants the respondent- until June 29th, 1914, to which action of the Court the Complainants object and except.

55 In the District Court of the United States for Porto Rico.

#942. Equity.

ANTONIO MONROIG et al.

vs.

CORNELIUS B. PARKER et al.

Journal Entry of November 2nd, 1914.

Upon motion of the respondents by Willis Sweet, their Solicitor, the time allowed said respondents to perfect their appeal and file the transcript of the record in the Supreme Court of Washington D. C. is Extended for a further period of ten days.

56 In the District Court of the United States for Porto Rico.

#942. Equity.

ANTONIO MONROIG et al.

vs.

CORNELIUS B. PARKER et al.

Journal Entry of October 23rd, 1914.

Upon motion of respondent- by Willis Sweet, Solicitor, the Court grants an Extension of 10 days' time for said respondents to perfect their appeal.

57 In the District Court of the United States for Porto Rico.
#942. Equity.

ANTONIO MONROIG et al.
vs.
CORNELIUS B. PARKER et al.

Certificate.

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico, do hereby certify *that* the foregoing type-written pages number 1 to 56 inclusive, to be a true and correct copy of certain proceedings in the above entitled cause, as called for by the præcipe filed by the counsel for the appellant, copy of said præcipe is hereto attached.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 10th day of November, A. D. 1914.

[Seal United States District Court for the District of Porto Rico.]

ANTONIO AGUAYO, *Clerk.*

58 DISTRICT OF PORTO RICO:

United States District Court.

No. 942.

ANTONIO MONROIG et al.
v.
CORNELIUS B. PARKER et al.

Mr. Antonio Aguayo, Clerk of said Court:

Please issue the following papers in said cause, and attach the same to the record on appeal, as per order of the said court:

The Bill of Complaint and amendments thereto,

The Answer and amendments thereto,

Statement of the case by the Appellants

Opinion of the Court

Final Decree of the Court

Petition for appeal & Order allowing appeal: Journal Entry Oct.

29/14

Assignment of Errors: Bond on Appeal

Orders of Court extending the time in which to file record

Citation

(Signed)

WILLIS SWEET,

Of Solicitors for the Appellants, Attorney for ———.

Service accepted this 20th day of October.

Solicitor for Appellee.

On this 21st day of October in the year of our Lord one thousand nine hundred and fourteen, personally appeared Eladio Candia, before me, the subscriber, Clerk Dist. Court U. S. for P. R. and makes oath that he delivered a true copy of the within paper to Mr. Frank Antonsanti, solicitor for the plaintiffs in this action on October 20th, 1914.

(Signed)

ELADIO CANDIA.

Sworn to and subscribed the 21st day of October, A. D. 1914.

[SEAL.]

ANTONIO AGUAYO,
Clerk Dist. Court of U. S. for P. R.
L. A. GROSS, *D. C.*

(Signed)

[Endorsed:] United States District Court, District of Porto Rico. No. 942. Antonio Monroig et al. vs. Cornelius B. Parker et al. Præcipe for Appeal. Filed Oct. 21, 1914. A. Aguayo, Clerk, by L. A. Gross, Deputy. Willis Sweet, Attorney for Appellants.

59

Return on Service of Writ.

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Writ on the therein-named Frank Antonsanti by handing to and leaving a true and correct copy thereof with Him personally at San Juan in said district on the 27th day of October, A. D. 1914.

H. S. HUBBARD,
U. S. Marshal,
By JOHN L. HAAS,
Chief Deputy.

60

Return on Service of Writ.

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed writ on the therein-named Antonio Monroig by handing to and leaving a true and correct copy thereof with him personally at Bayamon in said district on the 30 day of October, A. D. 1914.

H. S. HUBBARD,
U. S. Marshal,
By JOHN L. HAAS,
Chief Deputy.

61 UNITED STATES OF AMERICA, ss:

To Antonio Monroig et al., Frank Antonsanti, their solicitor, at San Juan, Porto, Rico, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the District Court of the United States for the District of Porto Rico, wherein the defendants Cornelius B. Parker et al., appealed to the Supreme Court of the United States and are the appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants in error as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Peter J. Hamilton, Judge of the District Court of the United States for Porto Rico, this 26th day of October, in the year of our Lord one thousand nine hundred and fourteen.

P. J. HAMILTON,
*Judge of the District Court of the
United States for Porto Rico.*

Service accepted by copy this 27 day of October, 1914.

FRANK ANTONSANTI.
ANTONIO MONROIG.

Oct. 30/14.

[Seal United States District Court for the District of Porto Rico.]

[Endorsed:] Marshal's fees 4.00; Marshal's expenses 1.00.

62 Law Office of Frederick S. Tyler. Rec'd Mar 16, 1915. No. 754.

In the Supreme Court of the United States, October Term, A. D. 1914.

No. 749.

CORNELIUS B. PARKER et al., Appellants,
VS.
ANTONIO MONROIG et al.

Appeal from the United States District Court for Porto Rico.

Stipulation.

In view of certain omissions and imperfections existing in the Transcript of Record in the above entitled cause, as transmitted to the Supreme Court of the United States, counsel of record for the

respective parties do hereby stipulate for the correction of such omissions and imperfections upon the face of said Transcript now on file in said Supreme Court, in the manner following, to wit:

(1) On page one (1) of said Transcript, under the heading "In the District Court of the United States for Porto Rico," that there may be inserted the date of filing of said Reformed Complaint, to wit: the 6 day of November, 1913.

(2) On page twenty-four (24) of said Transcript, above the heading "In the District Court of the United States for Porto Rico," that there may be inserted the date of filing of said pleading, to wit: the 13 day of January, 1914.

(3) On page twenty-eight (28) of said Transcript, in the blank lines at the end of the contract there inserted, that there may be inserted the names of the two parties to said contract, to wit: "Valentine Monroig, C. B. Parker," so that said instrument may appear complete.

(4) On page thirty-six (36) of said Transcript, at the bottom, that there may be inserted the order of the court, dated the 26 day of October, 1914, approving the "statement of the evidence" as inserted in said Transcript.

63 (5) On page forty-nine (49) of the Transcript, that the words beginning "Petition for appeal," etc., written in at the side of the page, be stricken as superfluous.

(6) On page fifty-one (51) of the Transcript, above the heading of the assignment of errors, that there may be inserted the date of filing of said pleading, to wit: the 29 day of October, 1914.

And it is hereby further stipulated that the aforesaid corrections may be made by the Clerk of said Supreme Court of the United States before the printing of said Transcript.

Dated at San Juan, Porto Rico, this 21st day of April, A. D. 1915.

N. B. K. PETTINGILL,

Counsel of Record in District Court for Appellants.

FRANK ANTONSANTI,

Counsel of Record in District Court for Appellees.

FREDERICK S. TYLER,

Of Counsel for Appellees.

64 In the District Court of the United States for Porto Rico.

#942. Equity.

ANTONIO MONROIG, JOSEFA O. MONROIG, AGUSTINA MONROIG, and
JOSE ANTONIO LOPEZ MONROIG

v.

CORNELIUS B. PARKER and JENNIE B. PARKER, His Wife.

Specific Performance on Injunction.

Certificate.

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the order of the court approving the "Statement of Facts" in said cause, as inserted in the Transcript of Record, was dated October 26th, 1914, and was in words and figures as follows, to wit:

"Approved as prayed, and ordered that the portion of the evidence included therein be made a part of the record in said cause for the purposes of said appeal.

Done and ordered in San Juan this 26 day of October, 1914.

(Signed)

P. J. HAMILTON, *Judge.*

And I further hereby certify that the same was inadvertently omitted from said Transcript of Record as transmitted to the Supreme Court of the United States and should be inserted at the bottom of page thirty-six (36) of said Transcript.

Witness my official signature and the seal of said Court at San Juan, in said District, this 16th day of March, A. D. 1915.

[Seal United States District Court for the District of Porto Rico.]

ANTONIO AGUAYO,

Clerk U. S. District Court for P. R.

[Endorsed:] File No. 24,444. Supreme Court U. S. October term, 1912. Term No. 700. Cornelius B. Parker et al., Appellants, vs. Antonio Monroig et al. Stipulation to correct errors in transcript of record. Filed April 27, 1915.

Endorsed on cover: File No. 24,444. Porto Rico D. C. U. S. Term No. 287. Cornelius B. Parker and Janie B. Parker, his wife, appellants, vs. Antonio Monroig et al. Filed November 17th, 1914. File No. 24,444.

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Office Supreme Court, U. S.

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JAMES D. MAHER

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 287.

CORNELIUS B. PARKER AND JANIE B. PARKER, His
WIFE, APPELLANTS,

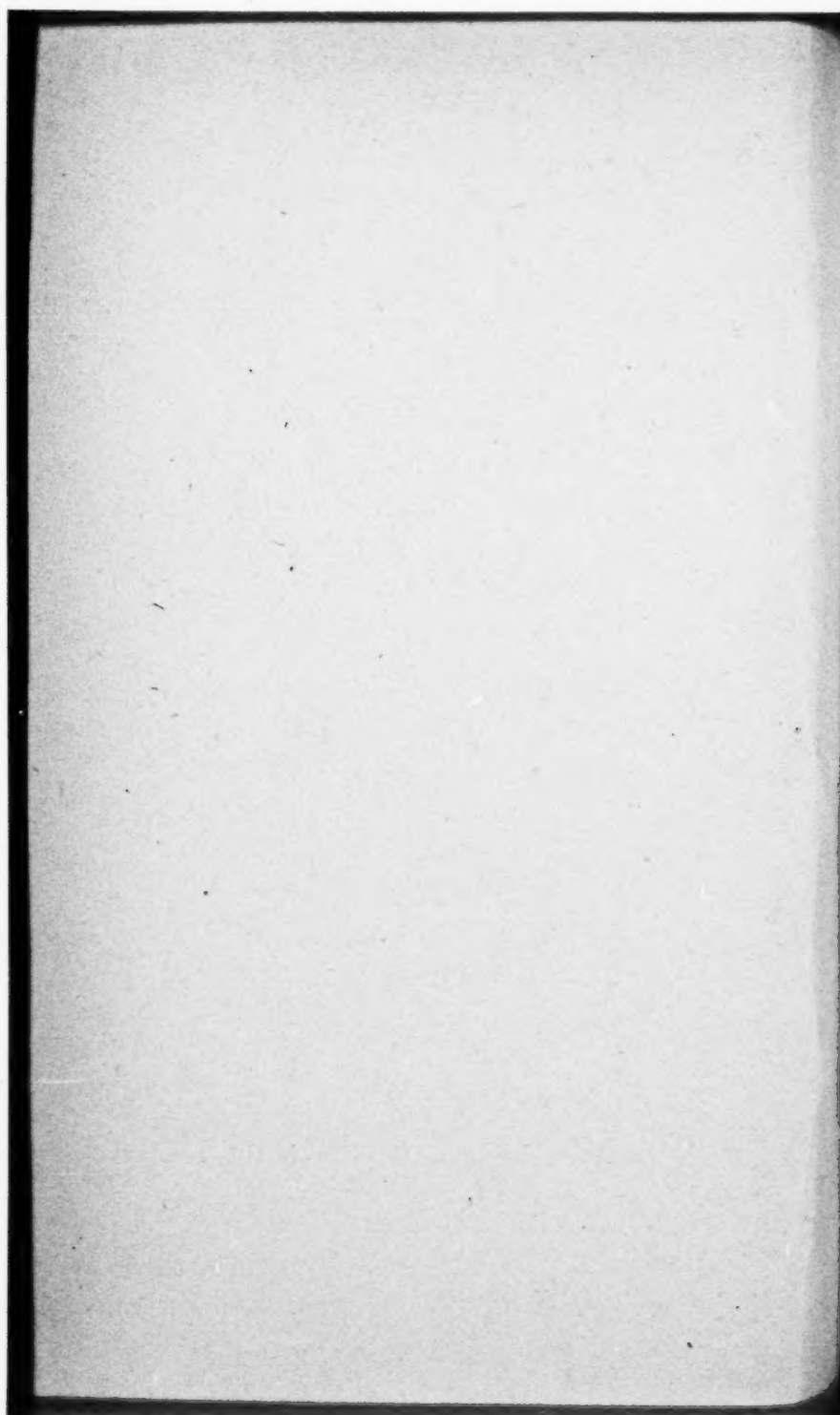
vs.

ANTONIO MONROIG, JOSEFA O. MONROIG, AGUS-
TINA S. MONROIG, ALBERT S. MENENDEZ, AND
JOSE A. LOPEZ MONROIG.

APPEAL FROM U. S. DISTRICT COURT FOR PORTO RICO.

BRIEF FOR APPELLANTS.

N. B. K. PETTINGILL,
Counsel for Appellants.



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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 287.

CORNELIUS B. PARKER AND JANIE B. PARKER, His
WIFE, APPELLANTS,

vs.

ANTONIO MONROIG, JOSEFA O. MONROIG, AGUS-
TINA S. MONROIG, ALBERT S. MENENDEZ, AND
JOSE A. LOPEZ MONROIG.

APPEAL FROM U. S. DISTRICT COURT FOR PORTO RICO.

BRIEF FOR APPELLANTS.

Statement.

The above-named appellees brought their bill of complaint in the United States District Court for Porto Rico, praying for the specific performance of a written contract made between Valentin Monroig on behalf of the appellees and the appellant Cornelius B. Parker *alone* for the conveyance of a predial, discontinuous, and permanent easement over a certain strip of land in said bill described (Transcript, pp. 1-5).

The bill of complaint alleged that on the 19th day of August, 1911, appellee Antonio Monroig, acting for the joint benefit of the appellees, purchased from the appellants a tract of land containing 207.17 cuerdas of land (the cuerda being practically the equivalent of an acre), the same being segregated from a larger tract of 287.16 cuerdas; that part of the consideration for this purchase was an agreement previously entered into between said Antonio Monroig and the *appellants* for an easement, or right of way, over the portion of said larger tract remaining to the appellants and over another tract of land separated from the first by a public road; that appellants had partly complied with said agreement by subsequently executing a deed granting said easement over the second tract mentioned, but had refused to convey the right of way over the portion remaining to them of the first tract, notwithstanding repeated demands; and that the agreement to grant said easement was the only reason which induced appellees to buy said 207.17 cuerdas of land at the price paid, as said easements were desired for the purpose of building a private railway for the transportation of sugar-cane, and appellees could not for that purpose reach the right of way granted them over the second tract without securing the privilege of using the easement over the first tract.

The prayer was that appellants consent to the establishment over said first tract of an easement, of a character and at a place particularly described, to be used by appellees for the construction and operation of said private railway, and that appellants be decreed to sign and execute in favor of appellees a good and sufficient deed therefor. There was also a prayer for an injunction, both temporary and perpetual.

The original answer of defendants was, by leave of court, superseded by an amended answer (pp. 10-14), wherein defendants admitted the conveyance of the tract of 207.17 cuerdas, but denied that the consideration for such purchase was as alleged, averring on their part that the deed therefor

was executed pursuant to a written agreement, whereby one Valentin Monroig agreed to pay \$125 per cuerda for the whole tract except a strip 75 feet wide extending along and parallel with the Comerio road the full length of the tract, which would have included 211 and a fraction cuerdas, instead of the 207.17 cuerdas which were actually bought, but that, under the deed as executed at the insistence of complainants, instead of a strip of uniform width of 75 feet along said road front appellants were left with a triangular strip measuring about 165 feet at one end and running to a point at the other, which was at the time of little use or value to appellants, and that thereby the agreement which led up to the execution of said deed was violated.

The appellants further admitted the granting of the easement over the second tract described in the bill, but denied that the same was in partial performance of any agreement, and alleged that such conveyance was accepted as satisfactory to all parties at the time it was made, which was contemporaneous with the conveyance of the 207.17 cuerdas, and was in full compliance with all agreements and understandings between the parties, the previous agreements having been based upon the purchase of the full area of 211 cuerdas contained in the tract agreed to be purchased, which appellees had refused to fulfill.

The answer added a further defense upon legal grounds, alleging that even if true that an agreement had been made for an easement over the first tract such agreement was null and void, because said property belonged to the conjugal partnership then existing between the appellants, while the agreement had been made by appellant Cornelius B. Parker alone, appellant Janie B. Parker not joining therein, and further that the granting of specific performance would involve the variation and alteration of the metes and bounds of contiguous estates, the right to which had prescribed by the lapse of more than six months from the execution of conveyance.

Upon the issues made under the foregoing pleadings much evidence was taken, but, under the assignment of errors made in this court, the only material portions are the several documents upon which the respective parties based their rights, which documents have been embodied in a statement of evidence signed by the court below and made a part of the record under equity rule 75 (pp. 15-22). These documents consist of the following:

1. An agreement, dated April 28, 1911, between C. B. Parker and the Sugar Company, known as "the successors of A. Monroig," represented by Valentin Monroig, for the purchase by the second party of a tract of land "composed of about 200 acres," which tract was particularly described, at the price of \$125 per acre.

2. An agreement, dated the same day as the former and between the same parties, whereby appellant Parker, as lessee of the property described, agreed to grant to the other party a right of way through the two tracts described in the bill of complaint, the particular location remaining to be thereafter determined, which agreement was conditioned upon the "carrying out in full" of the former agreement.

3. A contract of optional purchase, dated November 3, 1910, between appellant C. B. Parker and one W. G. Henry, showing that Henry was the owner and Parker the lessee of the land to be conveyed and over which right of way was to be granted under the two previous contracts.

4. The deed, dated August 19, 1911, executed by the appellants and granting to Antonio Monroig the right of way over the second tract described in the bill of complaint.

In March, 1914, the judge of the court below rendered an opinion in favor of the appellees (pp. 22-28), which was followed by final decree (pp. 28-30), whereby appellees were

declared entitled to a right of way, "predial, discontinuous, and perpetual in character," over the first tract described in the bill, which is again described in the decree; that appellees should have the right to construct, maintain, and operate a railroad line on the strip of land therein described, and that said decree should serve as a sufficient title of easement, a certified copy to be issued by the clerk for the purpose of being recorded in the registry of property. It was further decreed that appellants, their agents, servants, and attorneys, be *perpetually* enjoined from interfering with appellees in the construction, maintenance, or operation of said railroad line and the enjoyment and free use of the strip of land described for the purposes set forth.

From this decree appellants took their appeal (p. 30) and assigned the following errors (p. 32):

I.

The court erred in overruling the motion of defendants to dismiss the bill of complaint.

II.

The court erred in failing to sustain the legal defense based upon section 1328 of the Civil Code of Porto Rico, as set up in paragraph XIV of the answer of these defendants.

III.

The court erred in failing to sustain the legal defense of prescription based upon section 1375 of the Civil Code of Porto Rico, as set up in the same paragraph of the answer of defendants.

IV.

The court erred in entering a decree in favor of complainants specifically enforcing the contract described in com-

plainants' bill, because said contract was between complainants and defendant Cornelius B. Parker alone.

V.

The court erred in entering a decree in favor of complainants specifically enforcing said contract, because the same was void and unenforcible under the laws of Porto Rico, where it was made and was to be performed.

VI.

The court erred in entering its decree granting to the complainants an easement, discontinuous and perpetual in character, over the land of defendants in said decree described, because the contract upon which complainants' bill was based did not provide for an easement of that character.

VII.

The court erred in not entering a decree dismissing the bill of complaint, because the same was founded upon a contract unenforcible as against defendant Janie B. Parker and no conveyance as prayed for could legally be made by defendant Cornelius B. Parker alone.

ARGUMENT.

The points covered by the seven errors assigned and above quoted may be divided into five heads:

First. The contract of which specific performance is prayed was unenforcible, because it involved a conveyance of the title to real estate situated in Porto Rico belonging to a conjugal partnership, and only one member of that conjugal partnership had entered into the contract.

Second. Said contract was unenforcible, because it was void under the laws of Porto Rico, where it was made and was to be performed.

Third. A decree for complainants was unwarranted, because it was necessarily prayed against a defendant who was not a party to the contract decreed to be specifically enforced.

Fourth. The decree as entered was unwarranted, because the easement prayed for by the bill and provided for by the contract enforced was not of the character granted by the decree.

Fifth. Because the action had been barred by laches by analogy to the prescription fixed by section 1375 of the Civil Code of Porto Rico.

I.

In Porto Rico Real Estate of a Conjugal Partnership Can Be Alienated Only with the Consent of Both Husband and Wife.

Under the laws of Porto Rico real estate acquired by either spouse during marriage, with certain exceptions, belongs

to the partnership or "community," and since the Revised Civil Code went into effect in 1902 such property can be alienated or otherwise burdened only by the joint acts of husband and wife. We quote the pertinent provisions, numbering the sections as in the "Compilation of Revised Statutes and Codes" (1913), with the sections of the Civil Code in parenthesis:

"Sec. 3229 (159). The husband shall be the administrator of the conjugal property, except when stipulated otherwise. The purchases made by the wife out of the conjugal property shall be valid when the said purchases comprise articles for the use of the family, in accordance with their social position.

"Nevertheless, the real property belonging to the conjugal community may not be alienated or burdened, such a transaction being null, except when effected with the mutual consent of both parties to the marriage.

"Sec. 4420 (1314). The following is the separate property of the spouses:

"1. That brought to the marriage as his or her own.

"2. That acquired by either of them during the marriage by *titulo lucrativo*, that is to say, by gift, devise or descent.

"3. That acquired by right of redemption or by exchange for other property belonging to one of the spouses only.

"4. That bought with money belonging exclusively to the wife or to the husband.

"Sec. 4422 (1316). To the conjugal partnership belongs:

"1. Property acquired for a valuable consideration during the marriage at the expense of the partnership property, whether the acquisition is made for the partnership or for one of the spouses only.

"2. That obtained by the industry, salaries, or work of the spouses or of either of them.

"3. The fruits, income or interest collected or accrued during the marriage, coming from the partnership property, or from that which belongs to either one of the spouses.

"Sec. 4428 (1322). All the property of the marriage shall be considered as partnership property until it is proven that it belongs exclusively to the husband or to the wife.

"Sec. 4433 (1327). The husband is the administrator of the conjugal partnership, with the exception of what is prescribed in sections 81 and 82 of chap. VI, title V, of book first of this Code (an exception not material here).

"Sec. 4434 (1328). Notwithstanding the power which the husband has as administrator, he shall not have the power to give, to sell and (or) to bind for a consideration the real estate of the conjugal partnership, *without the express consent of the wife.*

"Every sale or agreement which the husband may make in respect to said property in violation of this section and the other provisions of this Code, or in fraud of the wife, *shall be null and shall not prejudice her or her heirs.*" (Italics supplied.)

It will be noted that while the language in which the prohibition is expressed in section 3229 differs from that in section 4434, the main difference in the intent of the two sections seems to be that the former applies to both spouses, while the latter is confined to the acts of the husband. Both clearly prohibit and make null such contracts as those upon which the bill of complaint in this case was based.

The sections containing that prohibition have been repeatedly discussed and construed by the Supreme Court of Porto Rico, and as this court usually follows decisions of the local court upon local laws we take the liberty of quoting from some of its decisions.

Amado vs. Registrar, 3 P. R., 134 (2d ed.):

This case treats of a deed executed on December 22, 1902, by one Felipe Pietri, a citizen of France and a married man not joined by his wife, describing land in Porto Rico. After stating the substance of section 1328 the court says:

"The application of the above provision in the present case is not affected by the statement made in clause 4 of the aforesaid deed, with reference to the qualification of the vendor Felipe Pietri to execute said deed under the laws of his country, as a French citizen, inasmuch as, according to the principles of private international law universally recognized in the determination of disputes of this nature, questions relating to the efficacy or nullity of acts and contracts directly affecting real property are regulated by the laws of the *Estatuto real*, or the laws of the country where such real property is situated, a principle recognized and sanctioned by the new Civil Code in sections 10 and 1292 thereof, the former prescribing that real property is subject to the laws of the country where it is situated. * * *

"Moreover, inasmuch as aforesaid section 1328 of the new Civil Code is in the nature of a prohibitory law to safeguard good morals and public order and, since its object is to protect married women against such frauds and abuses to the prejudice of their interests as may be committed by their husbands, thereby contributing to maintain peace and morality in the family home, the application of said laws cannot be omitted notwithstanding contrary provisions by other foreign laws, in accordance with section 11 of aforesaid Civil Code. * * *

"Therefore, inasmuch as the deed of sale of real property executed by Felipe Pietri in favor of the stock company known as "Union Agricola" under date of December 22, 1902, contains a *defect of nullity* which is *not capable of correction*, the same cannot be recorded in the registry of property."

Caballero vs. Registrar, 12 P. R., 214:

It appears that Caballero, a married man, held a mortgage upon real estate belonging to one Garcia. The mortgagor, Garcia, agreed to convey to Caballero the title to the property in payment and satisfaction of the mortgage. In the instrument carrying this agreement into effect, which included the conveyance of the property on the one part and the release of the mortgage lien on the other, the wife of Caballero

did not join to signify her consent to the transaction; hence the instrument had been denied record as to the cancellation of the mortgage, because it was null for lack of consent of Caballero's wife. The Supreme Court said:

"According to the provisions of sections 335 and 336 of the Revised Civil Code mortgage credits are considered real property; and as the contract embodied in the deed of June 28, 1906, constituting as it does a contract of purchase and sale involving a tract of land, for which the purchaser gave in payment the mortgage credit which he had thereon, there is realized by the purchaser Caballero a real act of alienation of the mortgage credit in question, inasmuch as he relinquishes it in order to give it in payment for the land, in which act *his wife* Isabel Santiago *did not take part*, and consequently the case comes within the provision of section 1328 of the said Civil Code, which requires *under the penalty of nullity* the express consent of the wife in alienation made by the husband of the real property of the conjugal partnership to which the mortgage credit in reference belongs.

"Therefore the deed in question contains an *incurable defect* which prevents its record in the registry of property."

Boscio vs. Registrar, 14 P. R., 605:

This case involves the validity of a deed of partition which recited that Juan Boscio, one of the co-owners of the tract of land to be partitioned, was married; but his wife was not a party to the deed. Here the Supreme Court applied section 159 instead of section 1328 and said:

"According to section 159 of said Code 'the real property belonging to the conjugal community may not be alienated or burdened, such a transaction being null except when effected with 'the mutual consent of both parties to the marriage,' which requisite has not been complied with in the deed of division of lands the subject of this appeal, in which it is set forth that Juan Boscio, one of the parties thereto, is married

to Eugenia Despres who has not appeared in the deed as giving her consent to the division of the land, which implies a real act of alienation."

Hence the deed was declared in that respect ineffective and void.

See also

Vidal vs. Registrar, 12 P. R., 198.

In order to avoid the consequences of the above decisions and the statute upon which they were based the contention was made below, which seems to have obtained the approval of that court (p. 25), that the statute referred to was not applicable to the appellants because, at the time the contract for the easement was signed by appellant, Cornelius B. Parker, his wife "had no interest in the property." Although the judge recognized that the husband "was the lessee with a right of purchase" he nevertheless concluded that "until this right was exercised there was nothing to which her ganancial right could attach." This is an evident misapprehension, the contract of purchase existing between said Cornelius B. Parker and the owner, W. G. Henry, having been entered into in 1910 (p. 17). That contract of purchase also shows that the same property had been under lease from Mr. Henry to Mr. Parker since 1906, and that the lease was of such a character as to be recorded in the registry of property.

From the above facts it necessarily results that the interest of appellant, Janie B. Parker, even under the lease to her husband was an interest in real estate, or, according to the phrase of the Porto Rican law, "a real right." It has been seen from the sections of the Civil Code above quoted that the property of the conjugal partnership which may not be alienated, burdened or otherwise disposed of by either spouse alone, includes everything covered by that phrase.

The Supreme Court of Porto Rico has decided that any leasehold right capable of being recorded in the registry is

real property. In a recent case treating of that subject it used the following language:

"Par. 5, Art. 2, of the Mortgage Law, designates as subject to record leases of real estate having a term in excess of six years or those in which the rental of three or more years has been paid in advance, or when, without any of these conditions, there is an express agreement by the parties to record in the registry of property. * * *

"The kind of a lease that *may be recorded* is one conceding a *real property right* in favor of the lessee. * * * Although the lease in question is not for a term of six years, nevertheless the agreement of the parties to record it in the registry gives such lien an effect equivalent to an excess of six years' lease, and in all events constitutes a *true real property right*."

P. R. Gen. Tel. Co. *vs.* Registrar, 18 P. R., 823.

It was further provided, near the end of said option contract (p. 19), that, in the event the option to purchase was *not* exercised, the leasehold right should not be interfered with; hence the exercise of the option affected the rights of the lessees in the property by cutting off the continuing leasehold and was to that extent prejudicial to the right of the wife *unless* by the purchase the fee-title vested in her as well as in her husband.

It is therefore apparent not only that appellant, Janie B. Parker, had such a "real property right" in the leasehold that such leasehold could not be disposed of without her consent, but also that the disposition made of it by the exercise of the option to purchase effected a merger of that right in the fee, which the husband could not acquire without its becoming community property.

Moreover, the reasoning of the court below which culminates in the statement that "whatever right Janie B. Parker acquired in this land was under and in subordina-

tion to the contract of purchase and sale made by her husband" is fallacious. When appellees contracted with Cornelius B. Parker they knew the exact state of the title; they knew of the lease; they knew of the option to purchase; and they knew that under their contract (p. 16) with Mr. Parker the latter was to exercise his option and acquire the title in his own name. Therefore, as he was described in the contract with them as a married man, they must be held to have known that the legal consequence of having the conveyance made by Mr. Henry to him would be to make it conjugal property. (See cases cited *post* III.)

Another point upon which the court below apparently failed to apprehend the situation fully was where it is said in its opinion (p. 25) that:

"The testimony seems to be that the money which defendant C. B. Parker obtained from the complainants was used to carry out this right of purchase, and, that but for payment of complainants' money there would not have been anything to which Mrs. Parker's rights could attach."

On the contrary the record shows (p. 18) that the purchase price paid by Mr. Parker to Mr. Henry for the whole tract was \$37,000; while the amount paid by the appellees to Mr. Parker for the 207.17 acres at \$125 per acre was \$25,896.25. So that over \$11,000 of the money of the appellants was needed to complete their purchase.

We fail to see, therefore, wherein the situation differed in principle from what it would have been had the fee title to the land been already vested in Mr. Parker at the time of the making of the contract. Whatever might have been the circumstances under which the title vested by purchase in the husband, at the same moment the ganancial rights of the wife must also have vested, because the property became "real estate of the conjugal partnership."

II.

The Contract Being Void, Specific Performance Could Not Be Enforced.

The decisions of the Supreme Court of Porto Rico cited under the previous head are amply sufficient to show that any conveyance or contract concerning the title to real estate of the conjugal partnership is void when signed by only one of the spouses. That being true, equity will not lend its aid to its enforcement. This court itself has said:

"Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident or mistake to so modify as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction, or the contract, is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such a transaction or contract, or any part thereof."

Hedges vs. Dixon County, 150 U. S., 182, 192.

Moreover, the wording of the Porto Rican statute prohibiting the disposal of conjugal real estate without joint consent makes such contract analogous to contracts for the conveyance of homesteads by one of the spouses under the laws of many States. We believe it is uniformly held that such contracts are void and, by the weight of authority, that being void they do not even create an estoppel against the spouse who signs them.

Stephens vs. Parish, 29 Ind., 260.

Crim vs. Nelms, 78 Ala., 604.

Law vs. Butler, 44 Minn., 482.

Bruner vs. Bateman, 66 Iowa, 488.

Meek vs. Lange, 65 Nebr., 786.

Hodges vs. Farnham, 49 Kan., 777.

Richards vs. Greene, 73 Ills., 54.

In the last-cited case it was said:

"Where a householder, possessing a homestead right, has a wife, our statute in express terms makes it a condition to the alienation of the homestead that the wife shall sign and acknowledge a release in writing of the homestead exemption. Without compliance with such condition, there will in such case be no alienation of the homestead. Although the husband himself here executed a release of the homestead right, it was without effect, even as against himself, so far as concerns the homestead rights. The statutory condition by which alone it could be affected was wanting."

III.

Specific Performance Never Decreed Against One Not a Party to the Contract.

This proposition would seem to be self-evident, because such a decree would be compelling one to do something which he had never obligated himself to do. In a case for the enforcement of a contract not affecting real property this court has said:

"The plaintiffs, therefore, failed in the first step necessary to entitle them to the relief prayed by their bill; they show no contract between themselves and the Railroad Company."

Baltzer vs. Raleigh, etc., Railroad Co., 115 U. S., 634, 648.

With reference to contracts similar to the one at bar Mr. Waterman, in his work on specific performance, says, at section 511:

"If the purchaser, when he enters into the contract, knows that the vendor has a wife, he of course takes the chances of the wife's refusal to release her right of dower, and, in the latter event, if he insists

on performance, he cannot justly claim, and will not be entitled to, anything more than a conveyance of the husband's share."

Hence, in a jurisdiction where the husband alone has no right to convey, he would logically be entitled to nothing. There are many decisions to the same effect, of which we quote a few:

"Specific execution of an agreement to sell and convey will not ordinarily be decreed against the vendor, a married man, whose wife refuses to join in deed, where there is no proof of fraud on his part in her refusal, unless the purchaser is willing to pay the full purchase money and accept the deed without her joining."

Graybill vs. Bough, 89 Va., 899.

"It has been the uniform practice of this court to refuse to decree the specific performance by a husband of a contract for the sale of land, with either abatement from the price or with indemnity, where a wife has not joined in a contract of sale, and refuses, of her volition, to join in a deed." (Citing authorities.)

Bateman vs. Riley, 72 N. J. Eq., 316.

"The third objection is that Mrs. Robinson was not a party to the contract, and should not, therefore, be required to unite with her husband in the deed to complainant. This objection is well taken, and the bill must be dismissed as to her."

Richmond vs. Robinson, 12 Mich., 193, 201.

Apparently realizing the conclusiveness of both the reason and authority against their endeavor to compel appellant Janie B. Parker to execute a conveyance because of a contract to which she was not a party, complainants attempted by the form of their decree to avoid the logical consequence. It will be noted that the decree does not command the execution of any deed by the appellant. It first declares the

appellees "entitled to an easement," then that "said easement shall be established," then that "complainants shall have the right to construct, maintain, and operate a railroad line on the" described property, and finally that "this decree shall serve as sufficient title of easement," followed by a perpetual injunction against appellants. But this effort, whether it could be successful under any circumstances, cannot here avail because inconsistent with the special prayer of their bill (p. 5) "that the defendants be ordered and decreed to sign and execute unto plaintiffs herein a good and sufficient deed specifically performing the acts herein complained of.

IV.

Perpetual Easement Not Authorized.

The fifth paragraph of complainants' bill alleges (p. 2) that the easement which they asked the court to decree them "was to be predial, discontinuous, and permanent in character and established for the *express purpose* of constructing and maintaining a *private railroad* over the strip of land comprising said easement, which was to be used by plaintiffs for the transporting of sugar-cane to the Central Juanita, Incorporated," and their prayer followed that allegation. But upon an examination of the written contract upon which complainants depended for proof of the above allegation it will be seen that the last paragraph of that contract (p. 17) reads as follows:

"This concession is given under the obligation of the party of the second part (successors of Monroig) to transport only cane to the mill 'Central Juanita.' In case that the road should ever *cease to be used* for any other purpose than that of transportation of cane, then this agreement *shall be null and void.*"

Examining the decree it is found (p. 29) that complainants were granted "an easement or right of way over that

portion of El Quinto property remaining in possession of the defendants" "predial, discontinuous, and *perpetual* in character"; and that (p. 30) they "shall have the right to construct, maintain, and operate a railroad line on the above described and designated strip of land in connection with and as a part of the main line of their said railroad leading to the 'Central Juanita' in the District of Bayamon, and in such manner as may be necessary for the full enjoyment thereof for the purpose of transporting sugar-cane thereover." And the defendants were *perpetually* enjoined from interfering with complainants in the enjoyment of the rights granted. While the language quoted refers to the *purpose* for which complainants desired the grant, there is no *limitation* as to the time or manner of the use. That such was not the intention of the parties to the contract is shown by the terms of the easement granted by appellants over the other tract (p. 21).

Certain sections of the statutes of Porto Rico defining and regulating servitudes or easements are as follows:

"SEC. 3609 (539). Servitudes may be continuous or discontinuous, apparent or not apparent.

"Continuous servitudes are those the use of which is or may be uninterrupted, without the intervention of any human act.

"Discontinuous servitudes are those used at long or short intervals, and which depend upon human acts.

* * *

"SEC. 3616 (546). Continuous and not apparent servitudes and discontinuous servitudes, whether apparent or not apparent, can only be acquired by virtue of a title.

"SEC. 3623 (553). Servitudes are extinguished:

* * *

"4. When the day matures, or when the condition is fulfilled, if the servitudes be temporary or *conditional*.

"SEC. 3624 (554). The form in which the servitude is to be used may be prescribed like the servitude itself, and in the same manner."

From which it may be observed that discontinuous servitudes can only be acquired by virtue of a title; that the form of their use may be prescribed in the instrument granting them, and that, in order to be extinguishable, the grant must fix a limitation either of time or circumstance. With a decree like the present one defendants are helpless ever to free their land from its *perpetual* burden whatever may be the uses to which the right of way is subjected or however long it may be abandoned.

We submit that the contract made by appellant Cornelius B. Parker even if enforceable did not warrant the terms of the decree.

V.

Action Barred by Statute of Limitation.

The following sections are from the Revised Civil Code of Porto Rico incorporated in the "Compilation of Revised Statutes and Codes" of 1913.

"SEC. 4480 (1374). In the sale of real estate made for a fixed price and not at the rate of a specified sum for a unit of measure or number, the increase or decrease of the same shall not be considered, even when greater or less area or amount than that stated in the contract may be found.

"The same shall take place when two or more estates should be sold for a single price; but, if besides mentioning the boundaries, which are indispensable in every conveyance of real estate, their area and number should be designated in the contract, the vendor shall be obliged to deliver all that is included within said boundaries, even when they exceed the area or number specified in the contract; and, should he not be able to do it, he shall suffer a reduction in the price, in proportion to what is lacking in the area or number, unless the contract be annulled by reason of the vendee not accepting the failure to deliver what had been stipulated.

"SEC. 4481 (1375). The actions arising from the three preceding sections shall prescribe after six months, counted from the day of the delivery."

The contract for the easement made between these parties covered two estates for a single price and, if the vendor (Parker) did not deliver "all that was included" in his contract, that is, if one of the two was omitted and the vendees (the Monroigs) elected not to annul the transaction, but to accept it notwithstanding "the failure to deliver what had been stipulated," their right to question the settlement prescribed at the expiration of six months "counted from the day of delivery," that is from the date of the conveyance of the easement, August 19, 1911, and this suit was not commenced until 1913.

Finally, complainants were not entitled to specific performance, because there remained no executory contract to be performed. When the parties on the 19th day of August, 1911, met to carry out the terms of the two preliminary contracts, one for the purchase of the tract of land and the other for the easement of right of way which formed part of the consideration inducing the purchase of the land (pp. 15, 16), they did so carry them out by executing two formal and solemn instruments of conveyance, into which the preliminary contracts became merged. One of those instruments was a conveyance of the land mentioned in the first contract; the other was a grant of a right of way (p. 20) in which it was recited that the parties had "agreed to constitute an easement of right of way over the property belonging to the Parker spouses" thereinbefore described, and "having agreed as to the conditions of said easement *carry the same into effect* under the following clauses"; and at the end is another recitation that "the parties hereto read this deed and find the same satisfactory."

The bill of complaint alleges in its fourth paragraph (p. 2) that the preliminary contract was between the repre-

sentative of complainants and the *defendants* for a right of way over the two tracts; in the fifth paragraph the character of the right of way is described; and in the sixth it is alleged that defendants executed an easement over the one tract, thereby "partly complying with the said agreement." But there is no allegation of either fraud or mistake in the description contained in that grant of easement; while the court below refused to adjudge costs against appellants because "there seems to have been room for an honest difference of opinion" (p. 28). Hence, we submit that the formal conveyance of August 19, 1911 (p. 20), accepted by the grantees therein, superseded the preliminary contract and made it *functus officio*, especially as that preliminary contract contemplated but *one grant*, "a right of way through the property known as Rio Hondo and El Quinto farms, entering at the Santa Catalina Creek, crossing the Comerio road from west to east and thence passing through the Rio Hondo plantation, entering, traversing, and emerging at points to be determined by the parties to this agreement."

When those *points were determined* by the party most interested—the grantees—and inserted in the description in the formal conveyance to the satisfaction of the grantees, and the conveyance with such description accepted by the grantees, that conveyance constituted a new and final contract which was binding on both parties as the ultimate expression of their intent in the absence of express allegation that it failed to be such ultimate expression because of fraud or mistake.

In a case where the contract had been one to furnish ice to certain Government military posts, the preliminary draft had included New Orleans as one of the posts, but the subsequent definite contract had omitted that. This court said:

"If the claimants had any objections to the provisions of the contract they signed they should have refused to make it. Having made it and executed it,

their mouths are closed against any denial that it superseded all previous arrangements."

Parish vs. United States, 8 Wall., 489.

In another case the bill was by the assignee of a corporation which had contracted with certain individuals not to disclose trade secrets. Those individuals were made defendants under an allegation that they had recognized the assignment of their contracts to complainant and accepted its benefits, hence were bound by them. But this court said:

"The allegations show that, having the old contracts before them, the parties came together under a *new agreement*, which was determined by reference to the terms of that contract but which *none the less was personal and immediate*."

Am. Colortype Co. vs. Continental Co., 188 U. S., 104, 107.

Notwithstanding the absence of any allegation of mistake in the bill of complaint, the judge below says in his opinion (p. 26):

"The notary who superintended the drawing of the papers was unfamiliar with the details and the evidence seems to show that it was a mistake on his part, and nothing else, which caused the failure to draw a third instrument embracing this right of way, or to embrace it in the right of way which covered the land on the south side of the road."

But in commenting on a similar situation this Court once said:

"If the stipulation was so important and valuable as is now contended for, and constituted an object of permanent solicitude, it would scarcely escape the notice of the proprietors in laying down the fundamental basis of their cessions. If it did then escape them, we should have reason to look for its incorporation into the more solemn instruments which were

contemplated thereafter to be executed by the parties, and were in fact executed by them in fulfillment of their engagement."

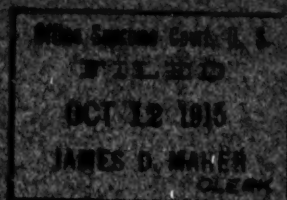
Van Ness *vs.* Washington, 4 Pet., 232, 282.

We submit, therefore, apart from all other considerations, that appellees could not be entitled to specific performance in the absence of any allegation of fraud or mistake, which could serve as a basis for the reformation of the contract as precedent to its specific enforcement in the manner decreed.

THE DECREE BELOW SHOULD BE REVERSED WITH INSTRUCTIONS TO DISMISS THE BILL.

Respectfully submitted,

N. B. K. PETTINGILL,
Counsel for Appellants



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1915.

No. 287.

CORNELIUS B. PARKER ET AL., APPELLANTS,

vs.

ANTONIO MONROIG ET AL., APPELLEES.

BRIEF FOR APPELLEES.

FRANK ANTONSANTI
FREDERICK E. TYLER
Attorneys for Appellees.

IN THE
SUPREME COURT OF THE UNITED STATES.
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No. 287.

CORNELIUS B. PARKER ET AL., APPELLANTS,

vs.

ANTONIO MONROIG ET AL., APPELLEES.

BRIEF FOR APPELLEES.

This case was originally commenced in law in the Insular District Court of San Juan by the appellees here, and was removed by the appellants here to the United States District Court for Porto Rico. A reformed complaint was filed on the chancery side of the United States District Court for Porto Rico on November 6, 1913 (Record, p. 1). To this reformed complaint an answer was filed on November 11, 1913 (Record, p. 6). On January 13, 1914, an amended answer was filed to the reformed bill of complaint (Record, p. 10). The case came on for hearing in the District Court upon the pleading and evidence adduced by the parties and was fully argued by counsel for the respective parties. On March 24, 1914, a final decree was entered

in favor of complainants (Record, p. 28). From that decree an appeal was prayed and the case is brought before this court (Record, p. 30). There are seven assignments of alleged error, but these seven assignments of error really present only three questions for consideration by this court, several of the assignments of error being evidently taken more as a matter of caution than to present any new question. Several of the assignments of error merely present the same question in different form and do not allege distinct error.

The first assignment of error is as follows:

“The court erred in overruling the motion of defendants to dismiss the bill of complaint.”

We contend that this court need not even consider this assignment of error, because the record contains no motion of defendants to dismiss. How can this court be expected to pass on this assignment of error when the alleged motion to dismiss is not in the record? The assignment of error is based on an alleged motion to dismiss, and the motion not being before the court, how can it know the grounds upon which it is based? This court can only consider questions of law that are properly raised by the record certified to this court from the court below. The motion to dismiss, upon which this assignment of error is based, not being in the record before this court, and the grounds of the motion being unknown to the court, it cannot pass upon it.

The court below could not have erred in overruling a motion to dismiss because the complainants below in their bill set up a cause which clearly showed their right to the equitable relief prayed for. They had no adequate remedy at law and the granting of the specific performance of their contract was the only way in which the ends of justice could be subserved. The complainants set up in their bill a case clearly entitling them to the equitable relief prayed for,

fully sustained the allegations of their bill with competent and conclusive evidence, and at no stage of the case could any motion to dismiss have properly been granted.

We submit, however, that on this record no question is properly presented for the consideration of this court by this assignment of error and there is nothing presented by it that this court can properly review.

This court can only pass on the record before it and cannot consider motions it has never seen.

The second, fourth, fifth, and seventh assignments of error present the same question for consideration by this court, and we address our argument to them as a whole for the sake of brevity and convenience.

The Second, Fourth, Fifth, and Seventh Assignments of Error.

These assignments of error are as follows:

Second assignment of error:

"The court erred in failing to sustain the legal defense based upon section 1328 of the Civil Code of Porto Rico, as set up in paragraph fourteen of the answer of these defendants."

Fourth assignment of error:

"The court erred in entering a decree in favor of complainants specifically enforcing the contract described in complainant's bill because said contract was between complainants and defendant Cornelius B. Parker alone."

Fifth assignment of error:

"The court erred in entering a decree in favor of complainants specifically enforcing said contract, because the same was void and unenforceable under the laws of Porto Rico, where it was made and was to be performed."

The seventh assignment of error:

"The court erred in not entering a decree dismissing the bill of complaint because the same was founded upon a contract unenforceable as against defendant Janie B. Parker, and no conveyance as prayed for could legally be made by defendant Cornelius B. Parker alone" (Record, p. 32).

Appellants contend under these assignments of error that as Janie B. Parker, the wife of Cornelius B. Parker, did not sign the contract of purchase of April 28, 1911, and was not a party to it, that she should not be compelled to correct the conveyance of August 19, 1911, so as to make it include and cover the desired right of way over the strip of land reserved by Parker and described in the third paragraph of the amended complaint (Record, p. 2).

The record shows that at the time the contract was entered into, Cornelius B. Parker was a mere lessee of the property with a right of purchase. Until he saw fit to exercise that right to purchase he had no interest to which his wife's rights could attach. She had absolutely no interest as long as he was a mere lessee. After the contract was made with Monroig, Parker exercised his right of purchase, but with money paid to him under the contract by Mr. Monroig (Record, p. 25). The property was acquired by Parker, under his right to purchase, after he made the contract with Monroig, and with money paid him by Monroig. The question therefore is, so far as these assignments of error are concerned, can it be allowed in a court of equity that a married woman acquire an interest in land incidental to her husband's purchase by means of money paid by a third party for her husband to buy the land, and then refuse to join in the deed of part of it to this third party as contemplated in the arrangement made by her husband? The question, as Judge Hamilton in his opinion in this case states, answers itself. The wife is not a third party in any sense under the law of Porto Rico, nor is she a *bona fide*

purchaser for value in any sense under the principles of equity.

In his opinion the district judge (Judge Hamilton), aptly states:

"Whatever right Janie B. Parker acquired in this land was under and in subordination to the contract of purchase and sale made by her husband. It would be inequitable to permit her to set up such a defense. It is as when land is bought with a vendor's lien on it for the purchase money. The object of a court of chancery is to confine parties to an equitable use of their rights and not to permit them to enforce legal claims in such cases as this" (Record, p. 25, near bottom).

It is perfectly clear from this record that Janie B. Parker had no interest in this property at the time the contract was made, her husband, Cornelius B. Parker, then being a mere lessee; his subsequent purchase of the property pursuant to his agreement with the Monroigs, and with the Monroigs' money, vested no rights in his wife that were not subordinate to the rights of the Monroigs. Janie B. Parker had no interest in this property that a court of equity can recognize ahead of the rights of the appellees here. It is admitted that under the Porto Rican law it is necessary that a wife join in a conveyance of land or of an easement. But it is denied that a married woman can acquire an interest in land incidental to her husband's purchase with money of a third party, furnished for the specific purpose of buying that particular land, and then refuse to join her husband in a deed to a part of the land to the third party as arranged for and agreed to by the husband, and maintain her refusal in a court of equity.

In determining what rights Janie B. Parker had acquired in the lands we must look to the meaning of the law and of its purpose and intent. It is clear that the meaning, purpose, and intent of the Civil Code of Porto Rico (articles 1327, 1328, and 159) is to protect the interests of the wife

and see that she be not defrauded of her interest in the property acquired by either of the spouses during the marriage. In this case there is no real question of the protection of the wife's interest. These sections of the Civil Code of Porto Rico are merely invoked as a weapon with which to hold up the appellees here, in an attempt to deprive them of their legal rights. The record speaks for itself and clearly shows that at the time of the signing of the contract Cornelius B. Parker was a mere lessee of the property with a right to purchase; that he purchased with Monroig's money paid to him under the contract and for that purpose, and that Janie B. Parker's technical interest as a wife was absolutely subject to the easement right in favor of Monroig, as provided for in the private contract. There is no element of a wife being defrauded of any rights in this case as contemplated by the sections of the Civil Code of Porto Rico.

In this case, therefore, it would be grossly inequitable to allow Janie B. Parker to set up such a defense.

The record shows that the real object of the appellees here in this matter was to acquire a right of way for a railroad, and that the large purchase of land which they made from Parker was the condition on which Parker consented to grant the rights of way over the two parcels of land.

The purchase of the land by the appellees here was a condition imposed by Parker to the granting of the rights of way for the appellees' railroad. The purchase of the land was incidental to the acquirement of the right of way for the railroad. The whole object of the appellees here, as this record shows, was to get the right of way they sought. And they furnished Parker with the money to exercise his option to purchase from Henry, so that they could acquire from Parker the right of way they desired. As a condition precedent to the granting of the right of way, Parker required them to purchase the two hundred acres of land. The appellees bought the land, not because they wanted it, but because they wanted the right of way for their railroad and to comply with the condition imposed by Parker. The purchase

of the land by the appellees was a step in the matter of acquiring the right of way desired. The agreement between the parties was an entirety and the purchase of the land was incidental to the obtaining of the right of way.

Appellants say that as Janie B. Parker was not a party to the contract of April 28, 1911, that she is not bound to join her husband in correcting any omission in the conveyance of August 19, 1911. But it is clear that as the rights she acquired were merely incidental to the purchase of her husband, who made his purchase with the money of the appellees, which they paid to him under the contract of April 28, 1911, any rights she may have acquired are subordinate to those of the appellees.

The evidence in the case shows that the failure to have a deed of easement executed from the "El Quinto" property to the Comerio Road was a mistake on the part of the notary who superintended the drawing of the papers (Record, p. 26). He was not familiar with the details of the transaction, and it was his mistake that this right of way from the "El Quinto" property to the Comerio Road was not embraced in the deed which granted the right of way over the "Hondo" property, or was not conveyed by a separate deed. The record shows that the appellees here are entitled to this right of way and the trial court was right in entering its decree to this effect.

The fifth assignment of error really presents no new question for this court to consider, but is merely the question raised by the second, fourth, and seventh assignments of error in different form. It is not denied by the appellees that the law of Porto Rico governs in this matter. In fact the district court so held. The *lex rei sitæ* governs all matters relating to real property. And it is admitted that under the Porto Rican law it is necessary for a wife to join in a conveyance of land or easement. The appellant claims that because Janie B. Parker was not a party to the April contract of sale she should not be compelled to join in correcting any omis-

sion in the conveyance of August 19, 1911. This is exactly the question heretofore discussed. Janie B. Parker's rights were merely those of a wife, acquired incidentally to the purchase by her husband with the appellees' money, and such incidental rights in equity and good conscience are necessarily subordinate to the rights of the appellees. Because it was the money of the appellees which Cornelius B. Parker used to exercise his option with when he purchased from Henry.

The third assignment of error is as follows:

"The court erred in failing to sustain the legal defense of prescription based upon section 1375 of the Civil Code of Porto Rico, as set up in the same paragraph of the answer of defendants."

The paragraph of the answer of defendants referred to in this assignment of error will be found near the top of page 14 of the printed record and is as follows:

"And for a further and affirmative defense defendants state that the granting of the injunction prayed for and the performance of the alleged contract to grant a right of way will involve *ipso facto* the variation and alteration of the metes and bounds of the contiguous estates, which, if plaintiffs desired to have done, could only have been done within the six months after the signing of the deed and taking possession of the property, and as a consequence the right of the plaintiffs so to do has prescribed in accordance with section 1375 of the Civil Code of Porto Rico."

We submit that there is no merit whatever in this assignment of error. It is a painful attempt to apply section 1375 of the Civil Code of Porto Rico in a case to which it has not the remotest application.

In the first place, in order to be intelligently understood section 1375 of the Civil Code of Porto Rico must be read in connection with sections 1372, 1373, and 1374.

These sections are as follows:

"SECTION 1372. The obligation to deliver the thing sold includes that of placing in the possession of the vendee all that is mentioned in the contract, according to the following rules:

"If the sale of real property should be made with a statement of its area, at the rate of a certain price for a unit of measure or number, the vendor shall be obliged to deliver to the vendee, if the latter should require it, all that may have been mentioned in the contract; but should this not be possible, the vendee may choose between a proportional reduction in the price or the rescission of the contract, provided that in the latter case the decrease in the real estate is not less than one-tenth of the area given it.

"The same shall be done, even when the area appears to be the same, if any part of the real estate is not of the character mentioned in the contract.

"The rescission in such case shall only take place at the will of the vendee, when the inferior value of the thing sold exceeds one-tenth of the price agreed upon."

"SECTION 1373. If in the case of the preceding section there is greater area or number in real estate than those mentioned in the contract, the vendee shall be obliged to pay the price of the excess if the greater area or number should not exceed one-twentieth of those mentioned in the contract; but should it surpass said one-twentieth the vendee may choose between paying the greater value of the estate or withdrawing from the contract."

"SECTION 1374. In the sale of real estate made for a fixed price and not at the rate of a specified sum for a unit of measure or number, the increase or decrease of the same shall not be considered, even when greater or less area or amount than that stated in the contract may be found.

"The same shall take place when two or more estates should be sold for a single price; but, if besides mentioning the boundaries, which are indispensable in every conveyance of real estate, their area and number should be designated in the contract, the

vendor shall be obliged to deliver all that is included within said boundaries, even when they exceed the area or number specified in the contract; and, should he not be able to do it, he shall suffer a reduction in the price, in proportion to what is lacking in the area or number, unless the contract be annulled by reason of the vendee not accepting the failure to deliver what had been stipulated."

"SECTION 1375. The actions arising from the three preceding sections shall prescribe after six months, counted from the day of the delivery."

Section 1375, therefore, in terms relates only to actions arising from the three preceding sections—1372, 1373, and 1374. It has nothing whatever to do with the issue of this case, which is for the enforcement of an easement. The only prescription possible against an action of this kind, that is, for the enforcement of an easement, would be the ten, twenty, or thirty year statute.

We submit that section 1375 and the three previous sections to which it refers have no application whatever to the issue in this case.

The sixth assignment of error is as follows:

"The court erred in entering its decree granting to the complainants an easement discontinuous and perpetual in character over the land of defendants in said decree described because the contract upon which complainants' bill was based did not provide for an easement of that character."

The contract upon which complainants' bill is based, entered into between the parties on the 28th day of April, 1911, provided that complainants should be allowed a right of way through the property known as "Rio Hondo" and "El Quinto Farms." This right of way granted to the complainants, the appellees here, is to consist of a strip of land not less than four meters and not more than five meters in width, and the contract provided that "This agree-

ment is made with the understanding that a prior contract of sale entered into by the parties under this date and relating to the purchase of two hundred acres of land shall be carried out in full, if not, then this agreement shall be null and void." "This concession is given under the obligation of the party of the second part to transport only cane to the mill 'Central Juanita' in case that the road should ever cease to be used for any other purpose than that of transportation of cane, then this agreement shall be null and void" (Record, p. 17).

It is clear that the complainants under the terms of the contract of April 28, 1911, were granted a perpetual right of way for their railroad, but the use to which that right of way was to be put was limited to the hauling of cane to the "Central Juanita." As long as they saw fit to utilize the right of way so granted to them for the purpose specified, their easement was subject to no other limitation. It was an easement discontinuous and perpetual. The right of way granted was for a particular use only, but if the complainants saw fit to operate it for this sole purpose there was no other limitation upon their right to do so.

Complainants contend simply that under this contract they are entitled to an easement or right of way for their railroad over the property specified, to be used by them for the sole purpose of transporting cane to the Central Juanita. And that said easement is to exist forever, if it be utilized for that purpose. As long as the terms of the contract are not violated the easement is to continue. There is no limit to its duration. The only limit is to its use. It may be perpetually and forever used to haul cane to the Central Juanita.

Claim is made that the contract was not executed by the appellees here in that they did not purchase some three or four cuerdas of land which the appellants claim they intended to sell and which the deed of conveyance did not include. We submit there is absolutely nothing in this contention. If the deed covered less land than the ap-

pellants understood they were selling, they should have declined to sign it. The record shows that at the time the deed was signed no mention of this matter was made. As a matter of fact the contract of sale of April 28, 1911, only imposed on the appellees here the duty of buying two hundred cuerdas of land as a condition to the granting of the right of way they sought (Record, p. 17). And this record shows that they actually did purchase TWO HUNDRED AND SEVEN CUERDAS OF LAND for \$25,896.25 (Record, p. 2). Certainly, therefore, it cannot be seriously contended that they have not substantially performed their obligation.

We submit that the complainants are entitled to an easement discontinuous and perpetual and the court below committed no error in so holding.

For these reasons we submit that the decree of the court below should be affirmed.

Respectfully submitted,

FRANK ANTONSANTI,
FREDERICK S. TYLER,
Attorneys for Appellees.

PARKER v. MONROIG.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR PORTO RICO.

No. 287. Submitted October 12, 1915.—Decided November 15, 1915.

A community cannot enjoy an acquet free of the obligations inseparably connected with it; and if it takes real estate, as in this case, subject to a servitude imposed by the master of the community before acquisition, it cannot enjoy the property afterwards free from such servitude because of the failure of the wife thereafter to unite therein.

Porto Rico Code, § 4481, is only applicable to cases of lesion in cases of sale embraced in § 4480 of that code, (§ 1375 of the previous code).

THE facts, which involve contracts affecting realty afterwards becoming community property and the liability of the community thereon, are stated in the opinion.

Mr. N. B. K. Pettingill for appellant:

The contract of which specific performance is prayed was unenforceable, because it involved a conveyance of the title to real estate situated in Porto Rico belonging to a conjugal partnership, and only one member of that conjugal partnership had entered into the contract.

Such contract was unenforceable, because it was void under the laws of Porto Rico, where it was made and was to be performed.

A decree for complainants was unwarranted, because it was necessarily prayed against a defendant who was not a party to the contract decreed to be specifically enforced.

The decree as entered was unwarranted, because the easement prayed for by the bill and provided for by the contract enforced was not of the character granted by the decree, and also because the action had been barred by

laches by analogy to the prescription fixed by § 1375 of the Civil Code of Porto Rico.

In support of these contentions, see *Amado v. Registrar*, 3 P. R. 134 (2d ed.); *Am. Colortype Co. v. Continental Co.*, 188 U. S. 104, 107; *Baltzer v. Raleigh &c. R. R.*, 115 U. S. 634, 648; *Bateman v. Riley*, 72 N. J. Eq. 316; *Boscio v. Registrar*, 14 P. R. 605; *Bruner v. Bateman*, 66 Iowa, 488; *Caballero v. Registrar*, 12 P. R. 214; *Crim v. Nelms*, 78 Alabama, 604; *Graybill v. Bough*, 89 Virginia, 899; *Hedges v. Dixon County*, 150 U. S. 182, 192; *Hodges v. Farnham*, 49 Kansas, 777; *Law v. Butler*, 44 Minnesota, 482; *Meek v. Lange*, 65 Nebraska, 786; *Parish v. United States*, 8 Wall. 489; *P. R. Gen. Tel. Co. v. Registrar*, 18 P. R. 823; *Richmond v. Robinson*, 12 Michigan, 193, 201; *Richards v. Greene*, 73 Illinois, 54; *Stephens v. Parish*, 29 Indiana, 260; *Van Ness v. Washington*, 4 Pet. 232, 282; *Vidal v. Registrar*, 12 P. R. 198.

Mr. Frank Antonsanti and Mr. Frederick S. Tyler for appellees.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

W. G. Henry, who had leased to Cornelius B. Parker, a married man, two farms, one Rio Hondo containing 440 acres and the other El Quinto embracing 278 acres, gave him in writing an option to buy both for the sum of \$37,000 in gold payable on or before May 1, 1911. Shortly before that period Parker and the Successors of A. Monroig, a sugar manufacturing corporation, agreed the one to sell and the other to buy a piece of land "composed of about two hundred acres, a part of the farm known as El Quinto" for \$125 per acre, and on the same day an agreement in writing was executed between the parties by which Parker created in favor of the corporation an

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Opinion of the Court.

easement of way across the farms El Quinto and Rio Hondo for the operation of a private railway conditioned on the carrying out by the corporation of the purchase of the portion of El Quinto as stated in the option contract. The option and the agreement to buy were both consummated. Parker acquired the two farms and the corporation bought from Parker 207 acres out of the farm El Quinto, about 70 acres, therefore, remaining in Parker. The formal deeds accomplishing this result are not in the record, but as found by the court below and not disputed, the matter was so arranged that the \$25,875 due for the part of El Quinto bought by the corporation was made available for Parker so that he was enabled to use it as part of the \$37,000 which under the option he was to pay for the purchase of the whole of El Quinto and Rio Hondo. It further appears from the opinion below that nothing was said in the deed to the corporation as to the right of way over the strip remaining of El Quinto, but at or about the time of the sale a deed was drawn by Parker and his wife giving to the corporation the right of way over Rio Hondo as provided in the option contract.

A controversy grew up between Parker and the corporation as to whether the corporation had not lost the right to the easement of way over the portion of El Quinto retained by Parker, and an attempt of the corporation to exercise the right of servitude was interfered with. This suit was then brought by the corporation and this appeal is prosecuted to obtain the reversal of a decree rendered in favor of the corporation directing the performance of the contract concerning the easement and preventing the interference with the enjoyment of such right.

It is apparent that the substantial controversy is a very narrow one, concerning only the easement of way over the small strip of the farm El Quinto remaining after carving out the portion of that farm bought by the corporation. And the contention as to the non-existence of

the right of way rests exclusively upon a challenge of the validity of the contract as to the right between Parker and the corporation. The contention is that by virtue of the purchase made from Henry of the two farms they became acquets of the community existing between Parker and his wife, and as under the Porto Rican law the assent of the wife to the disposal of real property of the community was essential and such assent was not given by the wife, Parker alone having been a party to the contract giving the corporation the right of way, that contract was absolutely void and not susceptible of being enforced. But the error lies in assuming that the property was community property when the option contract was made in order to measure its legality by such erroneous assumption. On the contrary when the contract made by Parker giving the right of way was entered into the property belonged to Henry and the only right possessed by the community was that which might arise from the exercise by Parker, the head and master of the community, of the option to buy from Henry which he, Parker, had procured. When therefore before the exercise of the option Parker agreed to the establishment of the right of way to attach to the property when bought under his option, such contract modified to that extent the right to buy conferred by the option, or, in other words, submitted the exercise of the option to a limitation which followed the property into the hands of the community and diminished the estate which it would otherwise have been entitled to under the option. Obviously from this it results that there was a legal obligation on the part of the community to respect and give effect to the right of way and that its refusal to do so gave rise to the duty of exerting judicial power to compel performance. And the cogency of these conclusions becomes additionally convincing when it is considered that there is no contention as to wrong against the community resulting from the contract which gave to the

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corporation a right to buy a part of the property covered by the option held by Parker especially when from the surrounding circumstances it is clearly to be deduced that the agreement to give to the corporation the right of way was one of the considerations by which it was led to consent to become a purchaser of part of the property which the option embraced, thereby in part at least affording the means by which Parker was enabled to acquire under the option the property which remained. The claim now made thus reduces itself to the contention that the right of the community to purchase under the option must be by it enjoyed free from the obligations inseparably resulting from its exertion; or, in another aspect, that the community having secured through its contract with the corporation the means to enable it to pay for the property which it acquired, can retain the property free from the obligation incurred in favor of the corporation.

There is a contention that the right to enforce the agreement to grant the servitude of way is barred by the limitation provided in § 4481 of the Porto Rican Code of 1913 (§ 1735 of the previous code). But on the face of the provision relied upon it is plainly applicable only to actions for lesion in cases of sale embraced by § 4480 of the same code, and has therefore no possible relation to the subject before us. So also there is a contention that the decree below was too broad since it enforced a perpetual easement instead of one depending upon the continued use of the property for the purposes for which the easement was created. But we think this contention is also wholly without merit because the decree when rightly interpreted is not susceptible of the extreme construction placed upon it.

Affirmed.